

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

STUDENTS FOR FAIR ADMISSIONS,)
Plaintiff,) Trial Day 1
vs.)
THE UNITED STATES NAVAL) Civil No.
ACADEMY, ET AL.,) 1:23-cv-2699-RDB
Defendants.)
) Baltimore, Maryland
) September 16, 2024
) 10:07 a.m.
)

THE ABOVE-ENTITLED MATTER CAME ON FOR
TRIAL
BEFORE THE HONORABLE RICHARD D. BENNETT

A P P E A R A N C E S

On Behalf of the Plaintiff:

ADAM K. MORTARA, ESQUIRE
PATRICK STRAWBRIDGE, ESQUIRE
J. MICHAEL CONNOLLY, ESQUIRE
CAMERON T. NORRIS, ESQUIRE
JAMES HASSON, ESQUIRE
R. GABRIEL ANDERSON, ESQUIRE
THOMAS R. MCCARTHY, ESQUIRE

On Behalf of the Defendant:

JOSHUA E. GARDNER, ESQUIRE
CATHERINE M. YANG, ESQUIRE
ANDREW E. CARMICHAEL, ESQUIRE
JOHN ROBINSON, ESQUIRE
MEDHA GARGEYA, ESQUIRE
CHRIS E. MENDEZ, ESQUIRE

Also Present:

EDWARD BLUM, STUDENT FOR FAIR ADMISSIONS
BRUCE LATTA, NAVAL ACADEMY
TRACEY URBAN, PARALEGAL
LINDSEY O'CONNOR, PARALEGAL
MICHEAL PUSTERLA, IT

(Computer-aided transcription of stenotype notes)

Reported by:

Ronda J. Thomas, RMR, CRR

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1 (10:06 a.m.)

2 **THE COURT:** Good morning, everyone. Those in the far
3 back may be seated.

4 This is calling the case of Students for Fair Admissions
5 v. The United States Naval Academy, Civil No. RDB-23-2699.
6 We're here to commence with a bench trial in this matter.

7 I will note that the standing orders of this Court have
8 previously required that masks be worn in all public areas of
9 the courthouse. That is no longer the case, but it is still
10 within the discretion of the presiding judge with respect to
11 masking policies.

12 Given the continued vestiges of the COVID-19 pandemic,
13 which included my being tested positive a month ago after a
14 long trip out West and then negative two days later, we still
15 require a mask to be worn here in this courtroom if people have
16 not been vaccinated.

17 So we have an honor system here. I know all the counsel
18 have indicated they've been previously vaccinated. To the
19 extent the members of the public, if you have not been
20 vaccinated, I'd ask you to raise your hand and Ms. Herndon can
21 give you a mask to wear. Otherwise, we'll proceed in that
22 fashion.

23 So with that, Mr. Mortara, you look like you're ready to
24 talk here.

25 **MR. MORTARA:** Your Honor, the Department of Justice

1 has two housekeeping matters. One relates to a witness who
2 will no longer be testifying live; the other relates to its
3 objections to three of the slides I intend to use in opening.

4 **THE COURT:** Yes. Yes.

5 **MR. MORTARA:** You have been provided hard copy of
6 those.

7 Mr. Gardner, take it away.

8 **THE COURT:** Yeah. Okay. Just one second here. I
9 just want to welcome everybody, first of all. So good morning
10 to you, Mr. Mortara. Am I pronouncing your name correctly?

11 **MR. MORTARA:** You are.

12 **THE COURT:** And Mr. Strawbridge and Mr. Connolly and
13 Mr. Blum. Mr. Blum is a representative of the Students for
14 Fair Admissions and, as a representative, is entitled to be
15 here throughout the entire trial. So good morning.

16 And then we have in the back row -- which many times, as
17 I've said before, includes the people who've worked the hardest
18 on a case generally -- Mr. McCarthy, Mr. Anderson, and
19 Mr. Hasson.

20 Am I pronouncing your name correctly?

21 **MR. HASSON:** Hasson, Your Honor.

22 **THE COURT:** Hasson. Nice to have you here. And you
23 have with you a very important person, Mike Pusterla.

24 Mr. Pusterla, you're listed as a technical adviser. You
25 probably are the most important person in the courtroom, along

1 with on the other side, along with our IT people if we have
2 glitches.

3 So welcome to all of you.

4 On behalf of the defendant, we have Joshua Gardner, John
5 Robinson, Catherine Yang, Andrew Carmichael, Chris Mendez, and
6 Medha Gargeya. Welcome to all of you.

7 And in the back row we have Mr. Bruce Latta.

8 Mr. Latta, you are the representative of the Academy.

9 I'll refer to it as the Naval Academy. And you are a
10 designated representative, and you are allowed to be in the
11 courtroom the entire time as well. And it's nice to have you.

12 To your right, we have Ms. Lindsey O'Connor and Tracey
13 Urban, and Errol Spears.

14 And, Mr. Spears, you are very important here as a
15 technical adviser as well in case our IT people fail us in any
16 way.

17 So welcome to all of you and specifically also to
18 Ms. Ronda Thomas, my able court reporter, who has now been
19 sentenced to be with me for the next two weeks. So it's nice
20 to have you here.

21 With that, let me just go over a few preliminary matters
22 here, Mr. Mortara, before I get to this evidentiary issue
23 that's arisen.

24 Local Rule 506 of this Court as well as Standing Order
25 2016-05 provides the policy concerning the use of electronic

1 devices here in the courtroom. Unless authorized by the
2 presiding judge, court proceedings may not be recorded,
3 photographed, broadcast, or transmitted outside of the
4 courtroom.

5 Counsel of record in the case may use electronic devices
6 for approved purposes in terms of checking calendars, perhaps
7 performing quick case-related legal research, or otherwise as
8 approved by the presiding judge while sitting at counsel table.

9 Otherwise, unless permitted by the Court, electronic
10 devices may not be used and must be turned off in the
11 courtroom, and use of electronic devices in violation of this
12 policy would, pursuant to normal court process, subject the
13 device to confiscation, which I'm sure won't be a problem here.

14 In terms of any preliminary matters, I would note under
15 Rule 615 of the Federal Rules of Evidence there will be
16 sequestration of witnesses or requests as to witnesses so that
17 any witnesses who are going to testify should remain out in the
18 vestibule outside of the courtroom.

19 I'll leave it up to counsel to observe if you believe a
20 witness who is one of your witnesses who has come into the
21 courtroom and has inadvertently violated that rule or made a
22 mistake. I can't possibly know who are the witnesses by face.

23 Yes, Mr. Mortara.

24 **MR. MORTARA:** Your Honor, if I may so the experts are
25 not confused.

1 **THE COURT:** That's right, and the main -- I was about
2 to get to that. It's Mr. Mortara. Am I pronouncing your name
3 correctly?

4 **MR. MORTARA:** Correct.

5 **THE COURT:** Yeah, is that, to the extent that there
6 are experts -- clearly, the preliminary rulings of this Court
7 have indicated that we haven't had *Daubert* hearings on each one
8 of these experts because, quite frankly, we don't need to. I'm
9 the gatekeeper when it comes to that here, and it's a bench
10 trial. And I will give great latitude to military witnesses of
11 any stripe and any rank who come forward and offer testimony.

12 If I think they're going outside of their expertise with
13 respect to the military, I'll so note and entertain an
14 objection.

15 But I'll leave it to, I guess, Mr. Mortara, Mr. Gardner,
16 and your team to look and be observant as to that. And when
17 their expert is testifying, you're permitted to have an expert
18 in the courtroom to listen and vice versa because they're
19 certainly -- I believe General Walker is your first witness, if
20 I'm not mistaken.

21 **MR. MORTARA:** Yes. He's with us today, Your Honor,
22 seated in the front row.

23 **THE COURT:** Yes. Welcome, sir. We welcome your
24 papers. Welcomes, welcome. And thank you for your service,
25 your military service.

1 If I inadvertently forget that, I intend to thank all of
2 those who testify with their military experience and thank them
3 for their service here.

4 To that extent, there's a waiver of that Rule 615
5 requirement.

6 So with respect to any -- I would also note this, Counsel:
7 It seems to me that in terms of evidentiary issues -- we're
8 going to address some evidentiary here to start. That's
9 perfectly fine.

10 It occurs to me that it is literally impossible to have
11 the witness on the witness stand -- thank goodness this is not
12 a jury trial -- and have, let's say, football teams of lawyers
13 come up to the bench and have the noise machine while the
14 witness sits in the witness box is normally the case. So I'm
15 sure that's the way it's done by other judges. I know this is
16 how I handle it.

17 In a bench trial, if we come into an issue, we will have
18 to have the witness just leave and go out in the vestibule
19 area. And I'll hear argument, I'll make a ruling, and it's a
20 matter of record.

21 The only thing that would make that a little more
22 difficult is with respect to matters that maybe are under seal.
23 And as to that, we'll just have to figure out how we handle
24 that. Just alert me ahead of time because then I have to clear
25 the courtroom.

1 And I hope we don't have many of those. I mean, this is
2 all a matter of public record. I mean, we've had some
3 documents that have been sealed along the way, but I'm not
4 going to be overly receptive to too much sealing here. This is
5 a matter of great public interest, and we're going to move
6 forward.

7 But just alert me to that. Otherwise, if we will an issue
8 and you make an objection and you say, "Your Honor, can we be
9 heard on this?" if I think it requires argument, I'll just have
10 the witness leave and go out in the vestibule area. And we
11 present it, and I'll rule, and bring them back in.

12 Is that workable to you?

13 **MR. MORTARA:** That absolutely does. And, Your Honor,
14 just to advise the Court, our teams have been working nightly
15 on exhibits to be displayed on the screen so that there's a
16 redaction of personal information. We're working together and
17 cooperatively with the Justice Department in preclearing all
18 the exhibits as they come up.

19 **THE COURT:** Sure.

20 **MR. MORTARA:** That's been working very well. I do not
21 anticipate the requirement of sealing.

22 **THE COURT:** That's fine.

23 **MR. MORTARA:** Just one small matter, the matter in
24 front of you with the slides is a --

25 **THE COURT:** Yes. Yes, I understand.

1 **MR. MORTARA:** -- demonstrative matter, not an
2 evidentiary matter.

3 **THE COURT:** I understand. Essentially, these three
4 items are demonstrative evidence to which you would like to
5 refer. Are you making the opening statement, Mr. Mortara?

6 **MR. MORTARA:** I am indeed.

7 **THE COURT:** And, Mr. Gardner, are you making an
8 opening statement?

9 **MR. GARDNER:** Yes, Your Honor.

10 **THE COURT:** Okay. All right. And as I understand the
11 order, there's an objection to three demonstrative exhibits
12 that are not coming into evidence to which Mr. Mortara would
13 like to make reference. Is that correct?

14 **MR. MORTARA:** That's correct, Your Honor. And as is
15 the case often with opening statements, Mr. Gardner is at a
16 disadvantage in that he doesn't know what I'm going to say
17 about them, but he does not like them the way they look. So I
18 think Mr. Gardner's --

19 **THE COURT:** Well, that's fine. Just so -- why don't
20 you, for public dissemination with respect to the screen and so
21 the members of the public can see about which we're speaking,
22 there is an exhibit -- none of these are going to be offered
23 into evidence apparently; they're just demonstrative exhibits
24 to which you're going to make reference in opening statement?

25 **MR. MORTARA:** That is correct, Your Honor.

1 **THE COURT:** All right. And so one is "Increasing the
2 weight placed on socioeconomic characteristics could help
3 generate racial diversity." Then the second is --

4 Thank you in your assistance for putting those up as I
5 speak to them. Thank you, Ms. Herndon. Thank you very much.

6 -- "No simulated pool of admitted students attained
7 current levels of academic preparation and racial diversity."

8 And the final one is "Share of students admitted to
9 Harvard by race and class portraits."

10 **MR. MORTARA:** Your Honor --

11 **THE COURT:** And I would note just in terms of my
12 reviewing these just quickly before I came on the bench, one
13 was -- the very first one to which I made reference was
14 submitted in *SFFA v. Harvard* in the United States District
15 Court for the District of Massachusetts in trial in June of
16 2018.

17 The second was with respect to *SFFA v. University of North*
18 *Carolina* in the United States District Court for the Middle
19 District of North Carolina in March of 2021.

20 And then the third is an exhibit referred to in the
21 Supreme Court opinion *SFFA v. Harvard*, 600 US 181, in 2023.
22 These were exhibits that were previously utilized in previous
23 litigation, correct?

24 **MR. MORTARA:** Your Honor, I'm happy to briefly
25 describe the point of them so -- to take Mr. Gardner's

1 disadvantage away if you want --

2 **THE COURT:** No, I think -- let me hear the purpose of
3 it; then I'll hear your objection. Is that fair?

4 **MR. GARDNER:** That's fine. But one clarification,
5 Your Honor. It's actually Demonstrative Slide 22. It's the
6 one with the number of red and blue dots on it.

7 **MR. MORTARA:** Oh. Well, that's withdrawn, then.
8 That's withdrawn.

9 **THE COURT:** I'm sorry. Your Demonstrative
10 Exhibit 2 --

11 And what is your comment?

12 **MR. GARDNER:** It was 22, Your Honor. It sounds like
13 my friend just indicated they are withdrawing that
14 demonstrative anyway.

15 **MR. MORTARA:** Your Honor, let me explain.

16 **THE COURT:** Okay. Go ahead.

17 **MR. MORTARA:** My slides are not numbered terribly
18 well. Mr. Gardner sent me an email objecting to Slide 22 --

19 **THE COURT:** I'm sure that was on Friday because you
20 all didn't work on this over the weekend, I'm sure.

21 **MR. MORTARA:** It was yesterday. We exchanged
22 yesterday morning.

23 **THE COURT:** I mean, you all are too old to work on
24 this over the weekend. Younger lawyers worked on this over the
25 weekend, but I would think -- the younger lawyers are

1 appreciating my comment here, Mr. Mortara.

2 (Laughter.)

3 **MR. MORTARA:** Well, Ms. Herndon implicitly saying that
4 I wasn't handsome at the pretrial conference, and now you're
5 telling me I look old.

6 **THE COURT:** We're laughing. It's a good way to get
7 off-stride here in the courtroom --

8 **MR. MORTARA:** I don't know what to do.

9 **THE COURT:** I guess my point is that, over the weekend
10 or whatever, he became aware of these and has some concern.
11 And so let's find out what he's going to offer them for, and
12 then I'll hear from you --

13 **MR. MORTARA:** He had an objection to one, and I got
14 confused --

15 **THE COURT:** That's fine. All right.

16 **MR. MORTARA:** The lines and dots, out.

17 **THE COURT:** Why don't you go ahead. What are you
18 proffering?

19 **MR. MORTARA:** So the point of both of these two slides
20 is not that they're evidence in this case. They're on the
21 public dockets in the two other cases which Your Honor is very
22 familiar.

23 **THE COURT:** Right.

24 **MR. MORTARA:** Before I step into something, we're
25 aware of Footnote 4. I'm a believer in Footnote 4. But the

1 point is is that when a discrimination defendant --

2 **THE COURT:** Footnote 4 meaning Chief Justice Roberts'
3 opinion in the *Harvard* case in Footnote 4.

4 **MR. MORTARA:** Yes. I'm wary of crossing the
5 Footnote 4 --

6 **THE COURT:** It's the first of many times we're going
7 to refer to Footnote 4, without question; so --

8 **MR. MORTARA:** Many times, I'm aware -- I'm very
9 cognizant of not making a foot fault as to Footnote 4.

10 **THE COURT:** That's good.

11 (Laughter.)

12 **MR. MORTARA:** The point here is that, when a defendant
13 in a discrimination case faces the burden of proving that their
14 program needs to satisfy strict scrutiny, defendants like
15 Harvard and UNC and their able counsel knew that they needed to
16 present evidence to court -- this actually is from Professor
17 Card's report in the *Harvard* case. It became a defense exhibit
18 that is actually cited twice in Judge Burroughs's opinion, and
19 it was actually reviewed by defense expert Dr. Gurea, who is
20 an expert for the DOJ here. I can show you all that.

21 But the point here is they knew they had to prove what the
22 impact of race on their system was. You can see on the screen
23 now. I've blown it up. They show the admitted class and what
24 happens when you remove race.

25 So too UNC and their counsel knew they had to prove what

1 they were doing, i.e., the impact of the consideration of race
2 on their admitted class. And that's basically the only point I
3 have to make about this slide.

4 And that is all in service of the point that the Naval
5 Academy has no idea what the impact of their use of race is on
6 their admissions process. That's the only purpose I have for
7 these two, Your Honor.

8 **THE COURT:** Mr. Gardner?

9 **MR. GARDNER:** Our objection is simply, Your Honor, my
10 understanding of opening statement is to present the
11 evidence that we intend to put into evidence. The
12 Demonstrative Number 6 cites to a document --

13 **THE COURT:** It might be helpful if we go one, two, or
14 three. What I have in my hand, I just was given this morning.

15 **MR. GARDNER:** I don't know what you have.

16 **THE COURT:** I've got -- the first one is "Increasing
17 the weight placed on socioeconomic characteristics." And the
18 second is "No simulated pool." And the third is "Share of
19 students." And I'll --

20 **MR. GARDNER:** Let's go with number one first.

21 Number one refers to a document that is not on plaintiff's
22 exhibit list. That is a document from another case, the
23 *Harvard* case. That is *Harvard's* economist, Dr. Card.

24 And if the point of opening statement is to tell the Court
25 what evidence they plan to present to Your Honor, then this is

1 an inappropriate demonstrative because they will not -- and I
2 think Mr. Mortara simply said they are not intending to
3 introduce this into evidence. So it's an improper statement.
4 It's not closing argument; it's opening statement.

5 And the same thing holds true for what I think you have as
6 number two.

7 **THE COURT:** "No simulated pool of admitted
8 students" --

9 **MR. GARDNER:** That's correct. That's actually a trial
10 court demonstrative from UNC's expert in that case. I pulled
11 up the docket last night when I received these demonstratives.

12 So, again, I think plaintiff's counsel has acknowledged
13 they have no intention of introducing this into evidence. And,
14 again, if the point of opening statement is to tell you what
15 evidence they intend to present, there's no universe where this
16 is coming into evidence. And, therefore, that's, again,
17 inappropriate opening statement material.

18 **MR. MORTARA:** Your Honor, if I may briefly.

19 **THE COURT:** Yes. Go ahead. Go ahead.

20 **MR. MORTARA:** Your Honor, in opening statement in a
21 bench trial it's my experience that we weave together the facts
22 and the law. Mr. Gardner intends to do the same. This is one
23 of his slides you're seeing on the screen. He's going to talk
24 about the law and how it applies to the facts of this case.

25 These demonstratives are only in service of my point that

1 when an accused discriminator has the burden of strict
2 scrutiny, they have to know the impact that race has on its
3 process and showing you that other accused discriminators,
4 Harvard and UNC, have done so? I don't have to show them;
5 you've already seen them.

6 **THE COURT:** Well, the point is that -- well, make sure
7 that these are appropriately marked as -- at least as to these
8 Court Exhibits 1, 2, and 3 that I'm dealing with here. And as
9 to the objection here, this is a bench trial. We certainly can
10 take judicial notice of more than a few facts.

11 These are not being introduced in any way in terms of the
12 facts in this case, Mr. Gardner; they're just essentially
13 general summaries by plaintiff's counsel in terms of what he
14 believes are the steps taken in an analysis that has to be
15 taken. This case is definitely distinct from *Harvard* and
16 *University of North Carolina*. But, for what it's worth, I'll
17 be glad to hear what he has to say, and we'll move forward.

18 So the objection is overruled. You may refer to these,
19 Mr. Mortara, in your opening statement.

20 As well -- and latitude will be accorded to you,
21 Mr. Gardner, as well on this.

22 Just so you understand, my point is, as I started reading
23 through these materials again over the weekend, clearly with
24 respect to the military witnesses testifying here, it's within
25 their area of expertise.

1 I will warn both of you -- and we start having -- no
2 disrespect to the military. If we start having the military
3 drift off in terms of their own socioeconomic analysis, I'm
4 going to be like, well, wait a minute, that's really no more
5 your domain than it is for a physician or an accountant to say.

6 I mean, so I will have those guardrails up. But I can
7 just warn you ahead of time as to that, it's of very little use
8 to me in terms of this. But this is fine.

9 To the extent you're talking about the lay of the land
10 here in terms of this jurisprudence with the *Harvard* and *UNC*
11 bench trials and ultimately the appeals and ultimately the
12 opinion of Chief Justice Roberts, you can make reference to
13 what you think it means, Mr. Mortara.

14 And your objection is noted, Mr. Gardner.

15 **MR. GARDNER:** Understood, Your Honor.

16 **MR. MORTARA:** We have one more issue before I begin.

17 **THE COURT:** Sure, sure. Go ahead.

18 **MR. GARDNER:** Your Honor, I wanted to alert you to the
19 fact that one of the witnesses on our witness list, Ms. Lisa
20 Truesdale -- she is the deputy assistant secretary of the
21 Navy -- had a personal issue, a family issue come up. She's
22 going to be unable to testify. She regrets this greatly. I've
23 worked very cooperatively with Mr. Strawbridge. And what we've
24 agreed, if you're okay with this, Your Honor, is even though
25 we're past the deposition designation deadline --

1 **THE COURT:** Sure.

2 **MR. GARDNER:** -- we would provide deposition
3 designations to plaintiff by Saturday --

4 **THE COURT:** That's fine.

5 **MR. GARDNER:** -- they will counterdesignate, and we'll
6 provide that testimony then.

7 **THE COURT:** That's fine.

8 Mr. Strawbridge, yes, sir. I saw you standing. Yes?

9 **MR. STRAWBRIDGE:** I just wanted to say that that's
10 absolutely right. We're fine with that.

11 **THE COURT:** Okay. That's fine.

12 **MR. STRAWBRIDGE:** We will work out the designations
13 and the counterdesignations.

14 One thing I think we left a little unaddressed at the
15 pretrial conference, which was our mistake, was does Your Honor
16 just want to receive the deposition designations by --

17 **THE COURT:** Mr. Strawbridge, I just had a note here as
18 to that effect because I realized we didn't discuss that.

19 Quite frankly -- quite frankly, it depends. If it's not
20 too lengthy, sometimes we have someone play the role of the
21 witness and read the answer back. It provides a wonderful
22 opportunity for a young lawyer to actually be active in the
23 courtroom in some way, be they acting as a witness or whatever,
24 to play a role.

25 So if it's a 20- or 25-minute deposition, which I assume

1 there are very few of those in this case, we can do it in that
2 fashion. But it just depends. There's a little more flavor to
3 it as opposed to just my reading through the deposition. And I
4 really don't care. Quite frankly, I've set aside enough time
5 for this case.

6 If you really want to have someone play the role of
7 Ms. Truesdale and read her -- you read the question and then
8 the answer, that's perfectly fine. And we can do that for an
9 hour or so. I'm not going to go do it for a five-hour or a
10 six-hour deposition; but if it's an hour deposition, we can
11 definitely do that.

12 **MR. GARDNER:** Yeah, I -- so a few reactions. One,
13 every person at this table will be handling multiple witnesses.

14 **THE COURT:** That's good.

15 **MR. GARDNER:** So I don't think that's a concern at
16 all.

17 **THE COURT:** Okay. And I'm sure SFFA has made the same
18 promise to its legal team as well. So okay.

19 **MR. GARDNER:** I'll let them speak for themselves.

20 **MR. MORTARA:** I regret to say, Your Honor, we have
21 not.

22 **THE COURT:** Okay. I'm kidding you, Mr. Mortara. Go
23 ahead.

24 **MR. GARDNER:** Second, I do have some concerns about
25 the time in this case.

1 **THE COURT:** Yeah.

2 **MR. GARDNER:** So maybe what we can do is we can confer
3 jointly --

4 **THE COURT:** That's fine.

5 **MR. GARDNER:** -- and see how that works out. But,
6 ultimately, at the end of the day, my mantra is whatever you
7 would like, Your Honor, is what we will do.

8 **THE COURT:** That's fine. And we have flexibility on
9 it as far as I'm concerned. And so you understand, in terms of
10 scheduling, we have all day every day this week. We have all
11 day every day next week. I have a little bit of a problem on
12 Friday the 27th because we're interviewing applicants for a
13 magistrate judge position that's now open as of today with
14 Judge Abelson becoming a district judge.

15 Having said that, I have time available the following
16 week. So I'm not real worried about time here. We're going to
17 have all the time you need. If we have to drift to a third
18 week, everyone should be advised. Stand by. That may be the
19 case. And if we drift into that September 30, October 1, then
20 we do. That's just the way it is.

21 **MR. GARDNER:** Your Honor, just for everyone's
22 scheduling purposes, what time would we be ending Friday,
23 September 27th?

24 **THE COURT:** I'm not sure yet. I think -- I've got to
25 look at the schedule. But I'm not going to sit in on the

1 all-day interviews. But we may start later or finish -- I
2 think -- right now, I think I'd probably rather start around
3 noon and go until 5:00 on that Friday. But we'll wait and see
4 how it plays out. I've got to look at the order of the
5 interviews and what have you. I just -- I'm not sure.

6 **MR. GARDNER:** Understood. We'll work cooperatively
7 and make sure there's always witnesses available.

8 **THE COURT:** All right. That's fine. Anything else,
9 Mr. Gardner, from your point of view?

10 **MR. GARDNER:** Nothing further from the government,
11 Your Honor.

12 **THE COURT:** All right. Mr. Mortara, anything else
13 from your point of view?

14 **MR. MORTARA:** Only some small matters. I wanted to
15 state for the record, I said at the end of the *Harvard* case
16 we'd never been treated better by any court, any staff, any
17 building in the country. Already today I can say we are at
18 that level.

19 And I want to thank Ms. Herndon and Ms. Thomas,
20 particularly Ms. Herndon. For the purposes of my presentation,
21 Ms. Herndon advised me not to run my own computer. I'm doing
22 that fully advised of the risks.

23 **THE COURT:** Okay. That's fine. And I thank you
24 for -- we pride ourselves on the civility and collegiality in
25 this court. And I think you would find it to be true of all

1 the lawyers here. And so I thank you for your comments,
2 Mr. Mortara.

3 So with that, I think that we are ready for opening
4 statements.

5 Plaintiff ready?

6 **MR. MORTARA:** I am ready, Your Honor.

7 **THE COURT:** Defense ready?

8 **MR. GARDNER:** Yes, Your Honor.

9 **THE COURT:** All right. With that, Mr. Mortara, I'll
10 be glad to hear from you.

11 **MR. MORTARA:** Good morning, Your Honor.

12 **THE COURT:** Good morning.

13 **MR. MORTARA:** Adam Mortara for Students for Fair
14 Admissions. I will not take time to do introductions. Our
15 trial time is precious, and the Court knows our personnel.

16 We are joined here also, as the Court observed, by Edward
17 Blum, the founder and president of Students for Fair
18 Admissions.

19 All I will say for us is that we are proud to be here in
20 our third trial in the tenth year of our mission to eradicate
21 race discrimination in college admissions. Our trial time is
22 precious. The Court is also by now very familiar with the
23 Academy's admissions process through summary judgment and the
24 preliminary injunction hearing. And I'm quite sure my friends
25 from the Department of Justice will use a significant part of

1 their trial time going through that process in great detail. I
2 will not do so this morning.

3 But what you see on the screen now as my first slide is
4 various stages of the admissions process and the key point that
5 I'm to start with, which is that the Navy admits that race is
6 used in the Academy's admissions process in at least some
7 places. You see some yeses in the first column.

8 Now, we disagree on some points. And we think the
9 evidence will show that race is used in their process in at
10 least a few more areas, as you see in the second column.

11 Your Honor might note that the table looks a little bit
12 short and that something may have been deleted. That's because
13 we had at some time thought that the Navy, the DOJ, was going
14 to say that race discrimination was a component of how
15 congressmen selected nominations for the Academy. Your Honor
16 made a comment about that at the pretrial in connection with
17 Nebraska and athletes, you'll recall.

18 But at the pretrial conference, Mr. Robinson for the
19 defendants told us that's not true. This is at page 26 of the
20 transcript. "Our position is that race does not play a role in
21 several stages of the Academy's admission process." And on
22 behalf of all defendants, he said it doesn't play a role in
23 getting a congressional nomination. So that no longer appears
24 on my slide.

25 Now, because the government admits that it is using race,

1 the burden shifts to the government.

2 I'm showing you on the screen a collection of case law,
3 from the First Amendment context concededly, *Playboy*
4 *Entertainment, Republication Party of Minnesota*.

5 The point here is that, when the government is subjected
6 to strict scrutiny, they have the burden. And if the evidence
7 is in equipoise, Students for Fair Admissions wins this case.

8 Now is my first time to mention Footnote 4. Your Honor
9 is, of course, right, and you've repeatedly said, that *Harvard*
10 and *UNC* do not predecide the outcome of this case. That's
11 Footnote 4.

12 I almost made a slide with Footnote 4 to show you that I
13 know that you know that that's the deal. The good news is
14 Mr. Gardner made one of those slides. I think he's going to
15 use one. So we'll have a slide on Footnote 4 even though I
16 didn't make one.

17 But *Harvard* does tell us a little bit about strict
18 scrutiny, like all the cases in the decades before tell us what
19 strict scrutiny is. And the United States Supreme Court has
20 never suggested in any case that is still good law today that
21 strict scrutiny means something different when the US military
22 is involved.

23 Because the government has admitted its use of race, the
24 burden shifts to them. But even if they hadn't, we would have
25 been able to show it pretty easily. I'm going to show you

1 right now some of the exemplars of the significant racial
2 preferences the Naval Academy uses in its admissions process.

3 On this slide you see the average SAT math and verbal
4 scores for admitted candidates from each of these three groups,
5 White, Black, and Hispanic. This is the data the Naval Academy
6 produced to us synthesized by our expert, Peter Arcidiacano,
7 and it's one of the tables from his report.

8 You can see, of course, that the average SAT math scores
9 for White candidates is higher than Black and Hispanic
10 candidates, Hispanic candidates higher than Black. To fill out
11 the picture, I'll put the average SAT scores for rejected
12 candidates.

13 And as Your Honor can see, the average SAT math score for
14 a rejected White candidate is actually quite a bit higher than
15 the average SAT math score for an admitted Black candidate. So
16 too with verbal. And you can even see that's true for
17 Hispanics. The average rejected SAT math score for Hispanics
18 is higher than the average SAT math score for admitted
19 candidates.

20 Why am I focused on SAT scores? As I said, they produced
21 the data to us, and our expert made these tables. But the
22 Naval Academy frequently discusses these matters. This is
23 Plaintiff's Exhibit 92. It's an email from June of 2023 that
24 involves Dean Latta and Melody Hwang, who will also testify in
25 this trial.

1 At the seventh page of the exhibit, there's a chart for
2 USNA class years 2022 to 2026 reporting the average SAT by race
3 and ethnic group. And you can see just briefly highlighted on
4 the screen the same information similar in kind to what I just
5 showed you.

6 The Naval Academy knows what it's doing. They're aware of
7 the very facts I just put to you. You can see the numbers are
8 quite similar. It's not the same dataset; it's not the same
9 group. That's why it's somewhat different. But they're aware
10 of these things.

11 You can also see the extent of their racial preferences
12 another way, which is in terms of admissions rates. This is
13 another table prepared by our expert. It takes a little
14 explanation, Your Honor.

15 As you know, the whole-person multiple is a score produced
16 by a formula jealously guarded by the Naval Academy and the
17 Justice Department, so much so that I am not permitted to put
18 the score up on the screen. I am permitted to tell you that
19 the whole-person multiple, secret though it is, is in part
20 composed and based on things like SAT scores, teacher
21 recommendations, extracurriculars. It is meant to be an
22 objective measure of the likelihood that a candidate will
23 succeed at the Naval Academy.

24 What you see here is our dataset segregated by deciles.
25 Each decile represents 10 percent of the population at issue.

1 At the top, Decile 10, these are the best of the best, the top
2 10 percent. And you can see the result of that. The
3 admissions rates here in percentages are extremely high, Your
4 Honor. They're basically automatically admitted. Some
5 differences you can see by race, but not much.

6 I should note for Your Honor this does not include
7 blue-chip athletes or students coming from the preparatory
8 school. The reason for that is that blue-chip athletes and the
9 prep pool are virtually automatically admitted to the Academy.
10 Race has essentially --

11 **THE COURT:** You're referring to what's called NAPS,
12 Naval Academy Preparatory School?

13 **MR. MORTARA:** Right.

14 And the fact is race doesn't have much to do with getting
15 in if you're getting in because you're being recruited to play
16 football. So we want to see the impact of race, not minimize
17 it. So we remove those students and look at the kids who
18 aren't coming from the places where admission is assured.

19 Now, I pointed out the top row and how those kids are
20 virtually assured of admission because they're in the top
21 10 percent. The opposite occurs at the bottom. In the bottom
22 10 percent, you don't see much differences there either. Those
23 kids are virtually assured of not getting into the Naval
24 Academy because their whole-person multiples are so low.

25 Where the action is is in the middle. And you can see

1 here in Decile 6 and Decile 5 -- that's the fifth from the top
2 and the fifth from the bottom -- I'll start with 5. White
3 candidates in the fifth decile and whole-person multiple have a
4 20 percent chance of getting in, while Hispanics enjoy a nearly
5 30 percent chance of getting in. So that's half again higher.
6 And Black candidates enjoy a 60 percent chance of getting in,
7 three times higher. And Your Honor can see this phenomenon is
8 replicated throughout the chart that is in front of you.

9 One thing Your Honor will notice -- and I'm sure you
10 already have -- is that Asian candidates up and down this chart
11 have a better chance of being admitted to Harvard than
12 corresponding White candidates in the same
13 whole-person-multiple decile. The Academy has a preference for
14 Asian students. I'll get into it a little bit more --

15 **THE COURT:** I think you said has a better chance of
16 getting into Harvard; you meant the Naval Academy.

17 **MR. MORTARA:** Your Honor, it's been six years since my
18 last trial.

19 **THE COURT:** That's quite all right. Don't worry about
20 it.

21 **MR. MORTARA:** And the last trial was *Harvard*. I think
22 I perhaps have it on the brain. I think I need to get a
23 Footnote 4 tattoo. I'm sorry.

24 **THE COURT:** All right. As long as you don't refer to
25 me as Chief Justice Roberts, we're doing fine.

1 **MR. MORTARA:** I might do that in a little bit. I'm
2 going to talk about him. Sorry for that, Your Honor.

3 **THE COURT:** That's all right.

4 **MR. MORTARA:** So the point is the Academy has a
5 preference for Asian candidates. It's right there on the
6 screen. We'll get into it a little bit more in a bit. The
7 point of the last three slides has been that, even if the
8 Academy had not conceded its use of race, we would have had
9 little trouble proving it. And now we've satisfied our burden
10 of production. The Department of Justice now has the burden of
11 persuasion, which they can carry for four reasons.

12 First, the Academy's use of race is in no way narrowly
13 tailored to the distinct interests the government is now
14 offering because the Navy itself, the Naval Academy, can't even
15 tell us what the impact of its use of race is. Those are the
16 slides that the department objected to.

17 Second and relatedly, the government can't prove that its
18 use of race at the Naval Academy meaningfully advances the
19 interests it's offering. That will largely be the testimony of
20 General Walker and Mr. Dakota Wood, the military experts Your
21 Honor referred to from our side. I won't steal their thunder.
22 I, frankly, have no experience with the military; so I'll let
23 them speak for themselves, but I will have a small point to
24 make about that.

25 Third, the Academy needs to identify a logical end point

1 for its use of race. Your Honor made a comment about that at
2 the preliminary injunction hearing. And through discovery,
3 they have failed to do so.

4 And, fourth, the evidence will show that the Academy's
5 proffered justifications today -- unit cohesion and lethality,
6 recruitment, retention, et cetera -- are at best incomplete and
7 at worst pretextual.

8 The evidence will show the Academy is engaged in the same
9 racial balancing Harvard was, pursuing the same goal. That's
10 what the evidence will show. Footnote 4 tells us the case is
11 not predecided. But if the case is exactly as the same as
12 Harvard, then it is. And the evidence will show they're
13 pursuing the same interests.

14 There are other reasons, Your Honor, including the failure
15 to adequately consider race-neutral alternatives. Our expert
16 Mr. Rick Kahlenberg is the leading expert on that. And I'll
17 leave discussion of that to him.

18 So I'll turn first to my first reason, which is narrow
19 tailoring. I have on the screen Footnote 6 from the *Wygant*
20 decision. And I have it on the screen only because it reminds
21 us what narrow tailoring is. Narrow tailoring means it has to
22 be the best fit. This is John Hart Ely telling us that.

23 It has to be the measure that has the best fit with the
24 stated ends -- not good enough, not substantially related,
25 best. That's what narrow tailoring is. You can't determine

1 whether race is being used too much if you cannot measure or
2 quantify how race impacts your process.

3 In many cases, this would be easy. In the prison riot
4 case, you know which prisoners are going to which end of the
5 prison. If the case was about a discriminatory pay scheme
6 where one race was paid more or less than the other, the
7 paystubs would tell us exactly who was impacted and how much.

8 And even in admissions cases, as now Your Honor got a
9 preview of, this is perfectly permissible and doable. And it
10 was done by Harvard. You're now seeing on the screen the slide
11 we spent some time discussing, and I'll spend very little time
12 now.

13 Harvard knew it had to prove the impact of its racial
14 preferences on its program. It did so in Harvard Defense
15 Exhibit 721, cited twice in Judge Burroughs's opinion, David
16 Card's expert report which was so relevant to this case. One
17 of the Department of Justice's experts reviewed it. Harvard
18 knew what it had to do. The lawyers from Wilmer Hale knew.

19 And the lawyers from Skadden knew in UNC what they had to
20 do. They had to show the impact that their racial preferences
21 were having on their process to carry their burden on narrow
22 tailoring.

23 This seems like a rather obvious concept. If I'm having a
24 party and ask my wife "Did I buy too much food?" she needs to
25 know how many people are there and how many are eating or she

1 can't tell me whether I bought too much food.

2 Now, Your Honor, I think, as General Walker alluded to a
3 little while ago, spent quite a bit of time in the United
4 States Army. And I've never been in the military, but one
5 thing I have learned through context with Mr. Hasson, the
6 former Army Ranger, and others throughout this case, including
7 our experts, is the military really loves to keep track of
8 things.

9 In fact, we have another colleague -- Mr. Hasson, his wife
10 had their baby three weeks ago. You remember that from the
11 pretrial conference. We have another colleague who would be
12 with us, but his wife gave birth to their first last week. One
13 of my former law students, he's a Marine infantry officer.

14 He had to testify in a court martial proceeding last year
15 over the disappearance of one piece of equipment from a range
16 exercise. What I learned from that is the military is very
17 good at keeping track of things.

18 However, the Naval Academy is not very good at keeping
19 track of how it uses race. On the screen you seen Ms. Hwang,
20 who will testify probably today, maybe tomorrow. She's the
21 director of nominations and appointments at the United States
22 Naval Academy. And here is what we will testify to.

23 "You're unable to say whether the racial compensation of
24 the class would look like if race was not a factor versus what
25 it looks like today?"

1 "A. Correct."

2 "You can't give me any quantification or range at all?"

3 "A. Correct."

4 That was her sworn testimony, and I have no doubt it will
5 be the same today.

6 Steve Vahsen is now the director of strategy at the Naval
7 Academy. He has served under five superintendents, and he was
8 the chief of staff to the superintendent for some time. So
9 he's been there for a while.

10 The director of strategy did not have a strategy for
11 telling us how racial diversity was impacting the campus.

12 "Do you have any idea as to what the level of racial
13 diversity at the Academy would be if race was no longer used as
14 a factor in the admissions process?"

15 He said, "I don't know."

16 And as Your Honor observed, Dean Latta is with us today.
17 He will testify this week. We asked him the same question.

18 "Would you agree with me, prior to the advent of this
19 litigation, no modeling had been completed at the Academy to
20 determine what would happen if it didn't consider race?"

21 "I'm not aware of a model. I'm not aware."

22 Now, Your Honor, we have our own expert, Peter
23 Arcidiacano. He did a model that shows the impact of race as
24 we see it. But the Department of Justice and the defendants,
25 they hired this man, Stuart Gurrea. He's an economist and

1 testifying expert, and he testifies quite a bit for the United
2 States government. He's here with us in the courtroom today.

3 And they paid Dr. Gurea, as they have in many cases --
4 he's testified a lot for the United States, like I said -- to
5 do an analysis. And while he's never published in the
6 peer-reviewed literature on this subject matter here about a --
7 what's called a discrete choice model -- I know this because
8 he's not had any peer-reviewed publications -- his opinion is
9 it is simply not possible to determine the impact of the
10 Academy's consideration of race on the admitted class. It
11 cannot be done.

12 One of the department's experts, one of the defense
13 experts, will come here and they will sponsor testimony that no
14 one can figure out what the impact of race is on the admitted
15 candidates. Cannot be done. If it cannot be done, they cannot
16 bear their burden of proof.

17 So let's move to a logical end point. As I said before,
18 the Court observed at the PI hearing that the end point of a
19 racial preferences program has to be logical and defined.
20 We've had discovery since then, and discovery has unearthed no
21 logic and no end point. Let's take a look.

22 Plaintiff's Exhibit 293 are the defense responses to our
23 interrogatories. Our Interrogatory No. 11 asked the defendants
24 to tell us the date and the logic.

25 "Identify the date you're going to stop using it and the

1 conditions that would need to occur."

2 And I'll point Your Honor to the last sentence.

3 "USNA anticipates that, once it both achieves and
4 maintains the racial and ethnic diversity of USNA's student
5 body at a level comparable to the ethnic and racial diversity
6 of the general population, it will no longer have a need to
7 continue its limited consideration of race in the admissions
8 process."

9 I will pause here, Your Honor, and ask a question that I
10 think the Court has to answer, and I have none.

11 What does the racial and ethnic composition of the sailors
12 and officers on a submarine a thousand feet below the surface
13 outside of the Straits of Taiwan and their performance have to
14 do with the racial and ethnic composition of the United States
15 population? I don't know. The defense says these are linked.
16 They'll have to prove to you how. I don't think they can.
17 General Walker and Mr. Wood will say these things have nothing
18 to do with one another.

19 But even so, this goal of equalizing the Academy's
20 population to the United States population is simultaneously
21 numerical -- we can take a snapshot today, and we know what
22 these numbers are -- and a moving target because the numbers
23 are always changing, as Your Honor noted at the preliminary
24 injunction hearing.

25 The Academy, however, does a pretty good job of keeping

1 track of the numbers. I'm now showing you on this slide data
2 we culled from the Academy. These are all admitted trial
3 exhibits, preadmitted now. They're called the class portraits.
4 It's kind of a glossy the Academy puts out describing the
5 admitted class every year. And we assembled this data from
6 those class portraits.

7 What you're seeing here is the African American share of
8 class, Hispanic share of class, and Asian American share of
9 class for the classes of 2018 through 2027.

10 And I want to point out one thing first, Your Honor.
11 There's two ways to calculate the African American share of
12 class. One, what you're seeing on the screen, is the
13 percentage of the class that identifies exclusively as African
14 American. Same too here for Asian American, exclusively as
15 Asian American. Hispanic, this is not an issue because that's
16 an ethnicity, not a race. But those two, the first column and
17 the third, these are individuals who exclusively identify in
18 that group.

19 There is another way, which is to ask somebody do you
20 identify as any part African American and any part Asian
21 American? And I'll show you those numbers in a moment.
22 They're quite a bit higher because the Academy has a
23 substantial number of multiracial midshipmen. And I'll get to
24 those numbers in a second.

25 The first point is Your Honor may recognize what's now

1 appearing on the left-hand side of this slide, which is a table
2 that Chief Justice Roberts thought was so important he put it
3 into the *Harvard* opinion. It's page 23 from our brief,
4 actually. But it's in the opinion at page 222. And you can
5 see he concluded that Harvard's focus on the numbers is
6 obvious. And, actually, behind that footnote is an extended
7 response to the dissent that kind of layers on and amplifies
8 what's being said here.

9 But the reason these two are side by side right here right
10 now is that you will see that one couldn't conclude that
11 Harvard's focus on numbers is obvious without also concluding
12 that the Naval Academy's focus on numbers is obvious. The
13 Supreme Court said what's on the left is racial balancing.
14 This Court gets to decide what appears on the right is. I
15 think the evidence will show it's racial balancing.

16 Now I'm showing you on the screen the same information but
17 now including multiracial, as I promised. You will see the
18 numbers have all gone up. African American share in the class
19 of 2027 is now 12 percent. Asian American share is now
20 18 percent. So the numbers have all gone up.

21 Your Honor will also have just noticed that the class of
22 2025 just disappeared. That's because we don't have that
23 information from the class portrait from 2025; so it no longer
24 appears on the slide. I apologize for that. It's just the way
25 the Navy produced the information that year.

1 Now I'm going to pause and tell you about something that
2 really surprised on my Sunday morning. After I got back from
3 mass, I got to see Mr. Gardner's slides. I'm going to show you
4 one of them right now. And I was really astonished by this.

5 Here's Mr. Gardner's slide. He's going to show this to
6 you. It's allegedly about Hispanic and Black representation at
7 the Naval Academy, comparing the U.S. Naval Academy on the left
8 to the U.S. population in blue.

9 And Mr. Gardner used that first measure of African
10 American representation I was showing you. That's why he could
11 get to 7 percent. The real number here, if you look at this
12 the way that would include the first Black president of the
13 United States, Barack Obama, and the current vice president and
14 perhaps future second Black president of the United States,
15 Kamala Harris, this number is actually 12 percent.

16 I was astonished to see this coming from the Justice
17 Department. It's not the way anybody looks at it, at least as
18 along as Barack Obama is the first Black president of the
19 United States, which he was. We'll come back to this in a
20 little bit, Your Honor, because there's another reason it
21 surprised me.

22 But I want to move on to our third reason. What the
23 Academy is doing doesn't meaningfully advance the interests
24 that it's now claiming are distinct. Most of that, as I said,
25 will be dealt with by General Walker and Mr. Wood.

1 I have one point to make about it. The Academy knows that
2 it has low leverage, minimal ability to impact the racial
3 composition of the entire Navy officer core. How do I know
4 that they know that? The Boston Consulting Group has so many
5 Naval Academy graduates that they actually volunteered to do an
6 in-depth, multimonth, highly detailed analysis for the Naval
7 Academy for free.

8 And the consultants went to work doing what consultants
9 do. They interviewed many people, crunched data. The Academy
10 fully supported the Boston Consulting Group work. I think the
11 defense may try to minimize this work, but the superintendent
12 bragged about it to his donors.

13 This is the superintendent's update to the foundation
14 board of directors. This is the primary 501(c)(3) that
15 supports the Academy. At Slide 5 you'll see his discussion of
16 the Boston Consulting Group review. When I said the Academy
17 fully supported the Boston Consulting Group, those weren't my
18 words; those were the superintendent's.

19 He also repeated the findings and recommendations and
20 adopted the Boston Consulting Group report without criticizing
21 it. So I think we should see what the Boston Consulting Group
22 had to say. This is Plaintiff's Exhibit 330. It's one of the
23 many slide presentations produced by the Boston Consulting
24 Group.

25 First, I'll stop off here at this slide just to show you

1 that they had robust participation from the USNA team. They
2 had the superintendent. They had the commandant. They had
3 Mr. Vahsen, the director of strategy. He does a lot of data
4 analysis, just not of what the impact of race is on the
5 admitted class. They had Dean Latta, the academic dean. It
6 goes on and on. This was real participation by the Naval
7 Academy.

8 Well, what did the Boston Consulting Group conclude? What
9 I just told you. The USNA alone has a low leverage to change
10 the composition of the overall fleet officer corps. Why is
11 that? That's because, as I think Your Honor might know, the
12 Naval Academy generates only about 28 percent of the
13 unrestricted line commissions.

14 I think Mr. Gardner has a slide suggesting the Naval
15 Academy actually creates 28 percent of all officers. That's
16 not true. It's about 20 percent of the overall officer corps,
17 but they like to focus -- and we will agree with them to
18 focus -- on the unrestricted line. 28 percent of the
19 unrestricted line. Well, that means 72 percent of the
20 unrestricted line is coming from elsewhere.

21 And what that means is that, no matter what you do at the
22 Naval Academy in the consideration of race, you're going to
23 have a diluted and minimal impact on the overall racial
24 composition of the officer corps. This is best illustrated --

25 **THE COURT:** Are you proffering that the evidence will

1 show that that follows through up to flag rank?

2 **MR. MORTARA:** Yes, Your Honor. For a variety of
3 reasons that will become clear during, I think, my
4 cross-examination of former lieutenant colonel, now Dr. Haynie.

5 **THE COURT:** Okay.

6 **MR. MORTARA:** This is -- particularly as you can see
7 in Scenario C, even if the Academy had no White midshipmen,
8 they couldn't get the fleet officers to match the racial
9 composition of the fleet enlisted. And this is not a
10 suggestion that anybody would ever do such a thing; it's an
11 illustration of the conclusion that the Boston Consulting Group
12 came to that the United States Naval Academy has low leverage
13 to change the composition of the overall fleet officer corps.

14 Why is that important? It's important because the Supreme
15 Court said so. I'm showing you on the screen excerpts from
16 Parents Involved. The minimal impact of the district's racial
17 classifications on school enrollment casts doubt on the
18 necessity of using racial classifications.

19 If they can't meaningfully move the ball, they can't do it
20 at all. I didn't mean to rhyme there, Your Honor, but I did.
21 And I want to move on now to my fourth reason.

22 The Academy's use of race, Your Honor, includes simply
23 inexplicable aspects, one I'm about to get into, that make
24 clear the interests they're offering are at best incomplete and
25 at worst pretextual.

1 Your Honor will recall the WPM slide. And you'll remember
2 that I pointed out the startling differences between admissions
3 rates between Asians and White applicants, showing a preference
4 for Asian applicants in admission to the U.S. Naval Academy.
5 Not Harvard, the U.S. Naval Academy. Harvard discriminated
6 against Asians. Why is the Academy doing this?

7 Remember this slide I showed you that the Asian American
8 share of class is always over 12 percent? It's now up to
9 18 percent. Asian Americans' overall representation in the
10 United States population as of 2023 is 7.5 percent if you
11 include people who identify as any part Asian. It's 6 percent
12 if you look at people who are exclusively Asian.

13 And yet the Academy is running these numbers up at two
14 times -- over two times the Asian Americans' representation of
15 the United States population. Why is that important? I'm not
16 the one that made this about the United States population; the
17 defense is.

18 Remember their response to Interrogatory No. 11? We're
19 going to keep using race until the midshipmen -- the brigade --
20 I can't remember what it's called -- until the midshipmen at
21 the Naval Academy match the United States population.

22 Well, as to Asian Americans, they've been matching the
23 United States population and exceeding it for a very long time.
24 And yet they persist in using a preference for Asian Americans
25 that simply bears no logical relationship to their stated

1 interests.

2 And don't take my word for it that they have this
3 preference; take Dean Latta's sworn testimony for it. This is
4 his declaration at the PI phase, Plaintiff's Exhibit 259. At
5 paragraph 73 of that declaration, he admitted that race or
6 ethnicity across all minority groups is one of the many factors
7 that could help inform the admissions process at a variety of
8 stages.

9 We asked him under oath, "Does all minority groups include
10 Asians?"

11 He said, "Yes."

12 Well, why is that important, Your Honor? It's important
13 because the United States Supreme Court says so. I'm putting
14 on the screen an excerpt from the *City of Richmond v. Croson*
15 case. Your Honor, I'm sure, is very familiar with this case.

16 The City of Richmond had what some would call a set-aside
17 program for minority contractors in construction in the city.
18 They said the distinct interest, if you will, that the *City of*
19 *Richmond* was offering is that they had this program to remedy
20 past discrimination.

21 The Supreme Court said, if so, the random inclusion of
22 racial groups that, as a practical matter, don't serve your
23 interests suggests perhaps that your purpose is not, in fact,
24 to remedy past discrimination.

25 I didn't write the response to Interrogatory No. 11. They

1 said the goal here is to match the United States population.
2 Continuing to award admissions preference to Asian Americans
3 has absolutely nothing to do with that. They can't defend it.

4 And look at the last sentence. "The gross
5 overinclusiveness of Richmond's racial preference strongly
6 impugns the city's claim to remedial motivation."

7 And I'll just show you again the slide Mr. Gardner is
8 prepared to show you with the interesting calculation of a
9 Black representation that wouldn't include Barack Obama.

10 What don't you see here? You don't see Asians. You don't
11 see Asians because the Academy's representation of Asians is
12 massively higher than the United States population. What on
13 earth are they doing? They won't be able to explain it.

14 There's another reason that what they're doing doesn't
15 seem to serve their interest. It's not quite as palpable and
16 nonsensical as a preference for Asians, but I'll tell you about
17 it.

18 The highly reticulated and allegedly holistic process of
19 the Academy admissions is we're told it's all about producing
20 Naval officers. Mr. Vahsen likes to make these little charts,
21 and we'll go over some of them with him. And I'm showing you
22 on the screen the two in the lower left, which are graduation
23 rate charts.

24 And what you'll see is that at every stage, despite the
25 fact that it comes close sometimes, African American graduation

1 rates at the Academy are always below Caucasians, always. And
2 the overall minority graduation rate is always below.

3 Your Honor will be naturally curious about the steep
4 falloff in 2023. That is attributed to COVID. Mr. Vahsen can
5 explain that. I'm sure he will.

6 There's all types of attrition at the Academy, Your Honor.
7 The vast majority of it is voluntary. Some of it is academic,
8 and that Mr. Vahsen has a nice little chart here showing you
9 the distribution of attrition.

10 I'll blow that up on the screen for you.

11 You can see the green is voluntary attrition. That's
12 quite high. Academic attrition is the purple. It ranges
13 between about 10 and 20 midshipmen per class year. There's
14 obviously conduct and honor, medical, physical as well.

15 The point here is that some midshipmen are flunked out.
16 They are told to leave because of academics. Others leave
17 voluntarily, perhaps before they flunk out. And yet the
18 Academy knows that the single thing --

19 **THE COURT:** Wait. Is this figure -- are you
20 proffering -- again, I'm not trying -- we're not deciding facts
21 here; we're just -- what you're presenting is what you think
22 the evidence will be in this case. Are you presenting that
23 this -- does that figure you're proffering include people who
24 make a decision after two years whether to stay or not?

25 **MR. MORTARA:** I believe it does include that, Your

1 Honor.

2 **THE COURT:** You recognize, though, that's a very
3 important time frame. The two-year point is a very important
4 time frame. One can have phenomenal grades, Mr. Mortara, and
5 still decide at the two-year mark, they decide they don't want
6 to continue, correct?

7 **MR. MORTARA:** Yes, Your Honor. In fact, since you
8 asked -- I wasn't going to make this part of my representation,
9 but it's a very interesting point.

10 **THE COURT:** Let me cut you off. I understand what
11 you're proffering as the evidence; I'm trying to make sure that
12 this attrition figure includes those who decide not to
13 continue.

14 **MR. MORTARA:** It does as far as I know. And we can
15 ask Mr. Vahsen and get the absolute answer. And this is part
16 of the evidence, Your Honor. It's Plaintiff's Exhibit 151.
17 Interestingly -- and I'll -- just to respond a little bit more
18 fulsomely to your question -- I wasn't planning to go into
19 this -- one of the problems that we've seen in the attrition
20 has to do with athletes, particularly football and, I think,
21 basketball players because of the transfer portal and now NIL.
22 The Navy can't offer NIL. Those groups are
23 disproportionately --

24 **THE COURT:** NIL, for the record, meaning names, image,
25 likeness in terms of payment to the athletes?

1 **MR. MORTARA:** That's correct, Your Honor. And
2 Mr. Vahsen exchanged some emails. I don't think I was planning
3 to get into them with him. Maybe Mr. Gardner will, or I'll fix
4 it. I'll do it for you because now you've asked.

5 There's some emails kind of being astonished at one of the
6 reasons that the African American graduate rate is a little bit
7 lower is actually because that attrition is disproportionately,
8 it seems, in some class years, African American because they're
9 disproportionately on some of these teams where activity in the
10 transfer portal and NIL might become an issue.

11 Sorry to get really deep into the weeds there, Your Honor.

12 **THE COURT:** No, I wasn't trying to interrupt you.
13 Clearly, it's just a proffer of evidence. And we'll hear from
14 Mr. Gardner, obviously, this morning as well. That proffer
15 that you say is going to be in evidence in this case, that
16 attrition will include people who make decisions at the two-
17 year mark.

18 **MR. MORTARA:** Yes --

19 **THE COURT:** That may have to do nothing with ability
20 or academic.

21 **MR. MORTARA:** 100 percent, Your Honor. So focusing on
22 the purple, '23 and the class of 2023, there are some students
23 who are effectively kicked out of the Academy for grades. The
24 Academy knows the single biggest predictor of academic
25 attrition probably after the whole-person multiple itself is

1 your SAT math scores.

2 Remember, they know they're admitting minority candidates
3 with lower SAT math scores, putting them on a track not to
4 absolutely certain or even probable academic attrition, but
5 more likely academic attrition.

6 Why am I saying this? Because this is supposed to be
7 about creating Naval officers.

8 And if you're letting in people that you know are more
9 likely to suffer attrition, whether voluntary or academic or
10 any other kind, you're not really trying to get -- or maximize
11 the number of Naval officers. It raises at least a question.
12 It's not like the Asian thing. The Asian preference is just
13 completely inexplicable by any person on the plant. They won't
14 be able to do it.

15 I want to do one more thing in the tradition of Steve Jobs
16 before I finish and let Mr. Gardner talk.

17 Remember the Harvard slide, Chief Justice Roberts's table
18 up against what's going on at the Naval Academy. This is more
19 than just a numerical comparison or a visual one because, for
20 all the Academy has tried to make this case about distinct
21 interests and take up the call of Footnote 4, as Your Honor
22 talks about so often, the Boston Consulting Group had it right.

23 Here's the slideshow again, 330. And I'm just showing you
24 a slide where the Boston Consulting Group for the Naval
25 Academy, fully supported by the Naval Academy, is comparing the

1 Naval Academy to Princeton, Harvard, Yale, Stanford, and
2 Dartmouth.

3 The Academy is, after all, an elite institution of
4 undergraduate education. And they are still pursuing the same
5 interests as these nonmilitary institutions were pursuing
6 between *Grutter* and Harvard. Between *Grutter* and Students for
7 Fair Admissions, all of these entities -- we know particularly
8 Harvard was -- was pursuing the educational benefits that
9 allegedly flow from a racially diverse student body. That's
10 what the Supreme Court authorized in *Grutter*. That's what all
11 these institutions were doing.

12 They all said that's what they were doing. They tried to
13 devise plans that were narrowly tailored. Harvard certainly
14 spent weeks litigating against us in a courtroom about whether
15 their plan was narrowly tailored. They all said they were
16 doing it. They wrote things like what I'm going to read you.
17 I'm going to read you a classic of the genre of their admission
18 statements.

19 "The composition of the class of 2027 should be a diverse
20 cross section of America, with the greatest possible variety of
21 backgrounds, to create an educational experience enhanced by
22 interaction among students with differing perspectives and life
23 experiences, raising the level of academic and social
24 discourse, sharpening critical thinking and analytical skills,
25 and preparing students to lead in diverse environments."

1 Your Honor, I won't ask you to guess which of these elite
2 institutions you see on the screen had that as a mission
3 statement. It was, in fact, I think you know, the United
4 States Naval Academy.

5 This is Plaintiff's Exhibit 29. It's from August of 2022,
6 not even a year before Students for Fair Admissions against
7 Harvard came out of the United States Supreme Court. It's from
8 the superintendent to Dean Latta, admissions guidance for the
9 class of 2027. And on the second page in the fifth paragraph
10 in the highlighted language you see on the screen now, you will
11 find exactly what I just read.

12 I want to be very clear. We are not saying that the Naval
13 Academy is totally disinterested in the composition of the
14 officer corps of the United States Navy even though they have
15 low leverage to impact it overall. We're not saying the Naval
16 Academy is disinterested in what the fleet needs. They're part
17 of the Navy. They're part of the Department of Defense.
18 They're helping to defend this country.

19 We are saying the Naval Academy was clearly pursuing the
20 *Grutter* educational benefits interest for decades. Melody
21 Hwang is going to come here today or tomorrow and swear under
22 oath that the entire time she's been with admissions at the
23 Academy, which is about 10 years before and after the Harvard
24 decision, nothing has changed about the use of race and
25 nothing -- and the reasons they use it have not changed either.

1 The reasons are right there on the screen. The Academy
2 developed a use of race that it felt was narrowly tailored to
3 the *Grutter* diversity benefits interest that every elite
4 college was also pursuing.

5 Your Honor, what are the odds that the exact same
6 unchanged use of race is also exactingly absolutely, down to
7 the jot and tittle, exactingly tailored to the totally distinct
8 interests that the defendants are going to offer about unit
9 cohesion, lethality, and et cetera?

10 It's like the odds of one key fitting two totally
11 different locks in two totally different houses owned by two
12 totally different people on opposite sides of the country.
13 Your Honor, it's not narrow tailoring if one size fits all.

14 Thank you.

15 **THE COURT:** All right. Thank you very much,
16 Mr. Mortara. Thank you very much.

17 And just for the record, to the extent I ask any
18 questions, we're not making any findings of fact here; I'm just
19 trying to understand what the proffer is as to the evidence you
20 believe will be submitted. And it probably will be true when I
21 hear from Mr. Gardner in a minute as well.

22 Mr. Gardner, I'll be glad to hear from you.

23 **MR. GARDNER:** Thank you, Your Honor.

24 I think we need to switch over the slides too.

25 **THE COURT:** Sure. Take your time.

1 **MR. GARDNER:** Is Your Honor ready?

2 **THE COURT:** Yes. All set.

3 **MR. GARDNER:** May it please the Court.

4 Chairman of the Joint Chiefs, Colin Powell, Mark Milley,
5 Mike Mullen; Secretary of Defense Mark Esper, Lloyd Austin;
6 Secretary of the Navy Carlos Del Turo.

7 Across decades and administrations, the leaders of our
8 military have made the judgment that a racially and ethnically
9 diverse officer corps is a national security imperative.

10 This judgment is informed by the unfortunate history of
11 racial unrest and, at times, violence in the military. It's
12 informed by studies recognizing the benefit of diversity and
13 building effective teams. And it's informed by the real-world
14 experience of those at sea and on the ground who are prepared
15 to sacrifice their lives for this country.

16 This judgment is not based on stereotypical views about
17 how certain minorities may think or act; rather, it is based on
18 what we know happens to military performance when you have an
19 officer corps that lacks diversity.

20 The Naval Academy's goal is to develop military officers
21 for combat. It is one of the primary sources for officers in
22 Navy and Marine Corps' war-fighting communities, the
23 unrestricted line. And it is an elite institution whose
24 graduates go on to become the senior leaders of the Navy and
25 Marine Corps.

1 The evidence will show that the Naval Academy's limited
2 consideration of race is part of a holistic assessment that
3 takes into account all aspects of an applicant's file and is
4 directly tied to the military's goal of having an officer corps
5 that reflects the diversity of the republic.

6 You will hear from senior officials from the Department of
7 Defense, the Department of the Navy, and the Naval Academy
8 about both the importance of those interests and how the Naval
9 Academy's admissions process serves those interests.

10 Ultimately, plaintiff will be unable to show that the
11 defendants have violated the Fifth Amendment in administering
12 an admissions process that furthers the military's
13 unquestionable compelling interests.

14 Now, before I go any further, Your Honor, I want to
15 address the key legal principles in this case. I'll venture
16 into a discussion of the military's compelling interests and
17 how the Naval Academy's limited consideration of race directly
18 furthers those interests in a narrowly tailored way. I will
19 also discuss the ways in which the Naval Academy doesn't
20 consider race.

21 As I know this Court is well aware, in *Students for Fair*
22 *Admissions v. Harvard*, the Supreme Court explicitly declined to
23 apply its decision concerning civilian universities and
24 recognized the potentially distinct interests that military
25 academies may present. And what are those interests?

1 More than 20 years ago, the Supreme Court explicitly
2 recognized those interests in *Grutter v. Bollinger*, where the
3 Court stated, "What is more, high-ranking retired officers and
4 civilian leaders of United States military assert that, based
5 on their decades of experience, a highly qualified, racially
6 diverse officer corps is essential to the military's ability to
7 fulfill its principal mission to provide national security."

8 And the *Grutter* court further recognized that, to fulfill
9 its mission, the military must be selective in admissions for
10 training and education for the officer corps and it must train
11 and educate a highly qualified, racially diverse officer corps
12 in a racially diverse educational setting.

13 The Supreme Court further recognized the importance of
14 leaders with legitimacy in the eyes of the public and explained
15 that, in order to cultivate a set of leaders with legitimacy in
16 the eyes of the citizenry, it is necessary -- necessary -- that
17 the path to leadership be visibly open to talented and
18 qualified individuals of every race and ethnicity.

19 With that legal framing, I want to turn to what the
20 evidence will show concerning the military's compelling
21 interest in a diverse officer corps.

22 And let's take a look at Plaintiff's Exhibit 445, which is
23 already in evidence.

24 **THE COURT:** Nothing's in evidence yet. We haven't
25 started yet, but I'm just -- you mean in terms of pretrial

1 rulings or my --

2 MR. GARDNER: Correct, Your Honor. My
3 understanding --

4 THE COURT: -- in terms of the request for injunctive
5 relief, you mean?

6 MR. GARDNER: No, Your Honor. My understanding is
7 those exhibits that were unobjection to by both sides, we
8 presubmitted and those are now in evidence.

9 THE COURT: Well, for all intents and purposes, you
10 know, there's Local Rule 107.5. If there's no objection,
11 they're in. But understand again, we're just in opening
12 statements in terms of what the evidence is going to be. So --

13 MR. GARDNER: Fair enough, Your Honor.

14 THE COURT: Good. And you're referencing what exhibit
15 number?

16 MR. GARDNER: This is Plaintiff's Exhibit 445,
17 unobjection to.

18 Nearly 15 years ago, Congress recognized the serious
19 issues that can result from the lack of a diverse officer corps
20 and established the military leadership diversity commission to
21 study how racial and ethnic diversity can improve the
22 effectiveness of the military.

23 That commission, comprised of numerous high-level military
24 officials and enlisted members, found historical evidence of
25 the problems inherent in the lack of diversity in military

1 leadership. And it recognized, during the Vietnam War, the
2 lack of diversity in military leadership led to problems that
3 threatened the integrity and performance of the nation's
4 military. And this is because service members' vision of what
5 is possible for their career is shaped by whether they see
6 individuals with similar backgrounds excelling and being
7 recognized in their service.

8 Now, during the course of this trial, you will hear
9 testimony from two well-regarded expert historians, Dr. John
10 Sherwood and Dr. Beth Bailey, about the historical racial
11 unrest and violence that undermined the military's war efforts
12 due to this lack of a diverse officer corps.

13 Now, the commission ultimately concluded, after extensive
14 analysis and input from those in the military, that the
15 diversity of our service members is the unique strength of our
16 military. And shortly after the commission issued its report,
17 the Department of Defense followed up with its diversity and
18 inclusion strategic plan.

19 Let's take a look at that the plan, which is Defendants'
20 Exhibit 137, which, again, has not been objected to.

21 As reflected in DX137, the Department of Defense reached
22 the judgment that diversity is a strategic imperative critical
23 to mission readiness and accomplishment and a leadership
24 requirement.

25 And the Department of Defense elaborated on this judgment

1 as follows:

2 "To the degree we truly represent our democracy, we are a
3 stronger and more relevant force. The department views
4 diversity as a strategic imperative."

5 And the Department of Defense recognized that diverse
6 backgrounds and experiences bring inherently different outlooks
7 and ways of thinking, the key to innovation in organizations.

8 That judgment was fully embraced by former Secretary of
9 Defense Esper, as reflected in his 2021 memorandum, which,
10 again, is unobjected to and is Defendants' Exhibit 177.

11 In this memo, directing the improvement of diversity and
12 inclusion in the Department of Defense, he explained, "To
13 ensure the morale, cohesion, and readiness of the military, it
14 is essential that our ranks reflect and are inclusive of the
15 American people we have sworn to protect and defend."

16 Your Honor, that judgment remains the same today.

17 As reflected in plaintiff's exhibit -- sorry --
18 Plaintiff's Exhibit 270, as Secretary of Defense Austin
19 explained in remarks to Senate Armed Services Committee in
20 April of 2022, enhancing --

21 **THE COURT:** What exhibit number are you referring to
22 here?

23 **MR. GARDNER:** This is Plaintiff's Exhibit 270.

24 **THE COURT:** All right. Thank you.

25 **MR. GARDNER:** "Enhancing diversity, equity, inclusion,

1 and accessibility is fundamental to our strategy. Building a
2 talented workforce that reflects our nation improves our
3 ability to compete, deter, and win in today's increasingly
4 complex global security environment, and doing so is a national
5 security imperative."

6 So with that, Your Honor, how does a diverse officer corps
7 serve this national security imperative? It enhances military
8 readiness. It facilitates recruitment and retention. And it
9 bolsters the perception of legitimacy of the armed forces both
10 here and abroad.

11 Let's start with military readiness. The evidence will
12 show that the more diverse units, including racially and
13 ethnically diverse units, enhances mission effectiveness. You
14 will hear testimony from Ashish Vazirani, a Department of
15 Defense representative who reports directly to Secretary
16 Austin, that increased racial and ethnic diversity in the
17 officer corps mitigates risk and enhances unit cohesion.

18 The Court will also hear from Vice Admiral John Fuller, a
19 three-star Naval officer with 37 years of military experience,
20 about the importance of diversity to support Naval missions and
21 mitigate operational risks.

22 And it will hear from Dr. Jeannette Haynie, who was a
23 senior adviser at the Department of Defense. Based on her
24 extensive knowledge of both military and civilian studies as
25 well as her experiences as a researcher herself, Dr. Haynie

1 will explain that the research supports the military's judgment
2 concerning the benefits of a diverse officer corps. And the
3 converse is true.

4 The Court will hear testimony from one of the government's
5 experts, Dr. Jason Lyall, an award-winning professor at
6 Dartmouth who literally wrote the book about diversity and
7 military performance and whose empirical research is relied
8 upon by the Department of Defense.

9 Dr. Lyall will explain how the absence of racial and
10 ethnic diversity can harm military readiness. And the
11 real-world examples the government will present parallel those
12 findings.

13 The Court will hear testimony from Captain Jason Birch,
14 who I know the Court is now aware of, a Naval SEAL officer,
15 about how the presence of minority officers helped address an
16 incident of racially discriminatory behavior in SEAL Team 8
17 that threatened to undermine that team's mission readiness.

18 Now, throughout this litigation -- and I heard it this
19 morning -- plaintiff appears to have misunderstood the
20 military's national security interests. They seem to think the
21 military contends that racial diversity in the officer corps is
22 necessary to clear rooms or call in airstrikes during combats.
23 I heard my colleague today talk about submarines.

24 In fact, I expect Your Honor will hear plaintiff ask the
25 government's witnesses these exact questions during their

1 examinations.

2 But plaintiff is conflating the tactical advantage in war
3 fighting with the strategic and operational benefits of
4 diversity that the military is relying upon. And as I just
5 mentioned, the strategic advantages in a diverse officer corps
6 are well demonstrated. The strategic risks of a nondiverse
7 officer corps are equally well demonstrated.

8 Perhaps plaintiff is willing to tolerate these risks, but
9 nothing in the Constitution requires the military to tolerate
10 risks to its war fighting capability.

11 Let me turn next to recruitment. The evidence will show
12 that having a more diverse officer corps is important to
13 attract the best and brightest that this country has to joining
14 the world's best fighting force.

15 And don't take my word for it. As reflected in
16 Defendants' Exhibit 67, as Navy Secretary Del Turo recently
17 explained to Congress, "In order to meet the challenges of a
18 complex world, we must continue to recruit, retain, train, and
19 promote the best from all of America. We need a diverse force
20 so that every child in America can see themselves wearing the
21 uniform or working in our civilian ranks tomorrow and every
22 viewpoint -- every viewpoint -- is represented in our
23 operations today so that we can draw talent from all of America
24 to build a war fighting advantage."

25 Vice Admiral Fuller, during this trial, will echo these

1 views as well. And Secretary Del Turo's judgment is not
2 hypothetical. Defendants will present deposition testimony
3 from Lisa Truesdale, the deputy assistant secretary of the Navy
4 for military manpower personnel, who will explain that, in her
5 time as an officer responsible for recruitment, that the use of
6 racially diverse recruiters was an important way to attract
7 racially and ethnically diverse enlistees to the Navy.

8 And this makes sense. When people see others that look
9 like them doing something and achieving success, it makes them
10 more likely to believe they can do the same thing.

11 And that takes us to retention.

12 As with recruitment, the evidence will show that it is
13 important for those in the military to see themselves in
14 leadership positions for purposes of retention.

15 The evidence will also show that a diverse and inclusive
16 environment mitigates attrition from the military and that an
17 environment that is not diverse and inclusive drives service
18 members out of the military.

19 I'd like to point your attention, Your Honor, to
20 Plaintiff's Exhibit 275. The Department of Defense's Office of
21 People Analytics conducted a multiyear study of this exact
22 issue and concluded as follows, that those who are less
23 represented in the force were the most likely to experience an
24 unhealthy diversity and inclusion climate which could impact
25 DoD efforts to increase diversity in the pipeline over time.

1 And it further found that the extent to which active-duty
2 members characterized their diversity inclusion climate as
3 healthy or unhealthy was associated with their retention
4 intentions as well as their individual and perceived unit
5 levels of readiness.

6 And the evidence will show that officers are culture
7 carriers and that culture can be positive or negative.

8 The Court will hear testimony about circumstances where
9 the presence of a minority officer helped improve a command
10 climate within a team because that service member felt
11 comfortable reporting racist behavior.

12 The Court will also hear testimony about how the presence
13 of minority senior officers helped encourage midshipmen and
14 junior officers to stay in the military because they saw
15 real-world pathways to career progression. And the Court will
16 hear testimony that minority officer retention is, in fact,
17 improving.

18 What's on the screen now, Your Honor, is Defendants'
19 Exhibit 59, which is also unobjected to. The evidence will
20 show that, once minority officers reach the 10-year mark in
21 their careers, they actually have better retention rates than
22 nonminority officers. And while there are a number of reasons
23 for this increased retention rate for minority officers, one of
24 those reasons is the increased minority representation in the
25 officer ranks.

1 Finally, let me briefly turn to legitimacy -- and by
2 "finally," I'm talking about the interests.

3 **THE COURT:** If I might, again, just in terms of what
4 you're proffering the evidence will be, Mr. Gardner, in terms
5 of Defendants' Exhibit 59 and the improvement of retention
6 rates at the 10-year mark, is the evidence from the defense
7 going to track that beyond the 10-year mark?

8 **MR. GARDNER:** Yes, Your Honor. In fact --

9 **THE COURT:** Because, clearly, the 20-year mark is also
10 a very important mark in terms of vesting for retirement as
11 well as going up the line. So, I mean, I'm wondering. I mean,
12 the ultimate test ultimately is the 20-year mark, not the
13 10-year mark; so --

14 **MR. GARDNER:** That's exactly right. In fact,
15 Ms. Miller, a representative from the Department of Defense,
16 will testify that, as you go further and further from the 10 to
17 the 15 to the 20 --

18 **THE COURT:** Sure.

19 **MR. GARDNER:** -- that trend stays the same, where
20 minority retention is better than nonminority retention.

21 Let me finally just briefly turn to legitimacy. The
22 military has also made a judgment that the diversity of the
23 officer corps should reflect that of the general population.
24 That is one way in which the military maintains legitimacy both
25 here and abroad.

1 That legitimacy is how the military can ensure recruitment
2 and retention. Defendants will present evidence about the
3 real-world impacts of diverse officers and legitimacy.

4 For example, the Court will hear testimony of how the
5 presence of a Black officer in Somalia in command of SEAL
6 Team 10 led to improved relations with the Somali military,
7 which in turn was critical to mission success.

8 So, Your Honor, understanding the military's compelling
9 interest in a diverse officer corps, the question becomes where
10 does the Naval Academy fit into all of this? It's simple. The
11 evidence will show that the military promotes officers from
12 within. This means that the aperture at the beginning when an
13 officer first assesses into the military will determine the
14 future senior officers 30 years in the future.

15 By statute, the Naval Academy is a primary source in
16 providing officers in the warfighting community, that
17 unrestricted line you heard about earlier. 95 percent of each
18 graduating class from the Naval Academy commissions into that
19 community.

20 And, overall, the Naval Academy graduates comprise
21 approximately 28 percent of the new Navy and Marine Corps
22 officers each year into that warfighting community.

23 Now, importantly, Your Honor, the warfighting community
24 makes up the bulk of the flag officer positions and command
25 billets in the Navy and Marine Corps. And when it comes to

1 those critical senior leadership positions, 40 percent of flag
2 officers in the Navy and approximately 90 percent of chiefs of
3 Naval operation have been Naval Academy graduates.

4 **THE COURT:** And is the defense proffering that there's
5 going to be movement in those percentages that include minority
6 and diverse --

7 **MR. GARDNER:** Correct, Your Honor.

8 **THE COURT:** I guess my question is are you proffering
9 that the evidence is going to indicate that, of the 40 percent
10 of officers who are flag rank who are Annapolis graduates, that
11 there's an increasing percentage of those who are of color and
12 are diverse? Is that what you're proffering?

13 **MR. GARDNER:** What I'm proffering, Your Honor, is that
14 it takes 30 years to get through that pipeline. And so those
15 that are coming in today, 30 years from now, you know, looking
16 at the retention rates that you will hear testimony about, will
17 result in a more senior diverse officer.

18 **THE COURT:** Well, I gather you're proffering that you
19 will show in terms of 10-year mark and the 20-year mark and
20 those on the track to attain flag rank --

21 **MR. GARDNER:** Correct, Your Honor.

22 **THE COURT:** -- that there are certain benchmarks along
23 the way. And, obviously, Mr. Gardner, those benchmarks vary
24 according to the military specialty, correct?

25 **MR. GARDNER:** Correct, Your Honor. That's right.

1 There is variance --

2 **THE COURT:** Again, this is just taking summary. But
3 the evidence will be, hypothetically, for example, the
4 submariners have to pass through what is called the Rickover
5 test. I mean, you know, if you were to -- I think Admiral
6 Rickover has passed away, I believe, by now, but the point
7 is --

8 **MR. GARDNER:** Yes. He is, yes.

9 **THE COURT:** He'd be 140 if he hadn't. But my point is
10 is that submariners go through a certain level -- if you don't
11 pass the Rickover test, you don't climb the ladder as a
12 submariner, for example.

13 So I gather you're prepared to proffer evidence not only
14 as to this 40 and 90 percent and those on track, but it may
15 involve a different analysis for different military
16 occupations, correct?

17 **MR. GARDNER:** That's right, Your Honor. And you'll
18 also hear --

19 **THE COURT:** I'm just questioning about you're going
20 proffer evidence in that regard, I gather?

21 **MR. GARDNER:** That's our intention, Your Honor. And
22 you'll also hear that there are barriers to promotion
23 practices. And the Navy is working incredibly hard to remove
24 the barriers.

25 But with that, let me say a few other things. The Court

1 will hear testimony that --

2 **THE COURT:** I don't mean to be -- either with you or
3 Mr. Mortara, I'm not trying to dictate how you-all are going to
4 present your case, but I'm just trying to let you be aware of
5 what I understand your proffers to be, and it triggers certain
6 questions in my mind. That's why I'm asking.

7 **MR. GARDNER:** Understood, Your Honor. And we have
8 been deeply conscious since the preliminary injunction that you
9 had great interest in what happens postgraduation from the
10 Naval Academy, and we intend to present testimony that meets
11 those concerns -- or interests, I should say.

12 The Court will hear testimony that, postaccession, the
13 Navy cannot consider race in making promotion or assignment
14 decisions. The upshot is that, if the Navy does not have a
15 sufficient number of diverse officers coming in the door on the
16 front end, it won't be able to increase the pool of diverse
17 officers on the back end to meet its critical national security
18 objectives.

19 The Court will hear from Dean Bruce Latta, the Naval
20 Academy's dean of admissions who's worked in the admissions
21 office for more than 20 years. As someone who has seen more
22 than 20 admission cycles at the Naval Academy, Dean Latta will
23 testify, based on his real-world experience and expertise, that
24 there are significant constraints on the Naval Academy's
25 ability to build a racially diverse class.

1 For example, as the Court is aware, unlike a civilian
2 college, every student admitted to the Naval Academy requires a
3 nomination to be admitted. And congressional nominations make
4 up approximately 80 percent of all nominations to the Academy.
5 Those nominations tend to skew in favor of nonminorities. Of
6 course, this is outside the control of the Naval Academy.

7 A second significant constraint, Your Honor, is that the
8 Naval Academy is required to graduate at least 65 percent of
9 every class with a technical degree. This means that STEM
10 interests shapes who the Naval Academy can admit on the front
11 end. This too tends to favor nonminority students.

12 Given these real-world constraints, the Naval Academy has
13 made the judgment that it is important to consider race as part
14 of a holistic process in making admissions decisions in order
15 to further the military's interest in a racially diverse
16 officer corps.

17 So how does the Naval Academy's admissions process work?
18 Let me turn to that now.

19 And let me say at the outset, the Naval Academy's
20 admissions process is complex. That complexity is largely due
21 to the nominations process as well as some other unique
22 features of the service academies.

23 This morning, I want to give you a high-level overview
24 with the understanding that Dean Latta will provide a much more
25 comprehensive and nuanced description of that process than I

1 could possibly do in my time this morning.

2 So, first, an applicant has to submit a preliminary
3 application and satisfy eligibility requirements set out in
4 federal statute, things like age restrictions, citizenship
5 status, marital status, and whether they have any dependents.
6 These requirements cannot be waived.

7 Then the candidate has to complete the application, submit
8 college entrance exams, get through a medical qualification
9 process, pass a physical fitness assessment, and sit for an
10 interview with a blue and gold officer.

11 Along the way, the candidate provides information about
12 not just their academic activities, but also their leadership,
13 their character, adversity they've overcome, any unusual life
14 experiences, athletic participation, whether they're the first
15 in their family to attend college or if they're a
16 first-generation American, whether English is their second
17 language, their family's income and whether they've received
18 hardship funding, and much more.

19 You will hear that all this information is critical to the
20 Naval Academy's holistic assessment of a candidate. Because
21 the Naval Academy's mission is to build military leaders, it's
22 review of applicants is not simply focused on grades or test
23 scores, as my friend seemed to suggest. In fact, it's not even
24 primarily focused on grades or test scores; rather, it is
25 reviewing applications to assess who would have the demeanor,

1 the skill, and the temperament to lead this country's Naval and
2 Marine Corps forces.

3 And you will hear that this review is not mechanistic. To
4 the contrary, it takes substantial judgment in considering all
5 aspects of an applicant's file.

6 Now, as I alluded to a few minutes ago, Your Honor, all
7 applicants of the Naval Academy must receive a nomination.

8 While the parties in this case may disagree on a lot, I think
9 there is agreement that the nominations process and in
10 particular the congressional nominations process, drives the
11 Naval Academy's admissions process.

12 Dean Latta will explain that there are two types of
13 nominations: those from a statutory nominating authority and
14 service-connected nominations.

15 Statutory nominating authorities are primarily
16 congressional nominations. And, again, congressional
17 nominations make up 80 percent of the Naval Academy's brigade
18 of midshipmen.

19 Service-connected nominations, on the other hand, are
20 reserved for children of certain service members, members of
21 services or ROTC programs, and candidates selected by the
22 superintendent.

23 The evidence will show that congressional nominations
24 often play a determinative role in the Naval Academy's
25 admissions process. So I want to focus my time today on that

1 process.

2 A member of Congress can have five midshipmen that they
3 nominated at the Naval Academy at any given time. These are
4 called charges. When a member has fewer than five charges at
5 the end of an academic year, the member is considered to have a
6 vacancy for the following admissions cycle. And for each
7 vacancy, the member can nominate up to a specified number of
8 candidates. Importantly, the Naval Academy has no -- let me
9 emphasize this -- no control over which candidates members of
10 Congress nominate.

11 What that means is that much of the applicant pool is
12 completely outside of the control of the Naval Academy. As the
13 Court may recall from the preliminary injunction hearing, there
14 are three methods members of Congress may use to nominate a
15 candidate.

16 The first is the principal numbered alternate method in
17 which a member identifies a principal nominee and ranks a list
18 of alternates.

19 And the second is a principal competitive alternate
20 method, in which a member identifies a principal nominee and a
21 list of unrated alternates. And approximately 35 percent of all
22 congressional nominations use this principal method.

23 And the third is the competitive method, in which a member
24 submits the nominees to the Naval Academy without any order of
25 preference.

1 Again, the Naval Academy has no control over which method
2 of selection a member of Congress chooses.

3 So understanding the application process as well as the
4 nominations process, I want to show now how the Naval Academy
5 evaluates candidates. A computer-generated whole-person
6 multiple score, also known as the WPM, is calculated by an
7 algorithm based on information like class rank, test scores,
8 and extracurricular activities from the candidate's file.

9 The evidence will show that race and ethnicity are not a
10 part of the whole-person multiple algorithm. Candidate files
11 are then randomly assigned by computer to a member of the
12 admissions board and briefing of the full board.

13 The admissions board does not select candidates for
14 admission to the Naval Academy. Rather, what the admissions
15 board does, their primary task is to advise on whether a
16 candidate is qualified or not qualified. Race and ethnicity
17 are not considered in determining qualification.

18 And as Dean Latta will explain at trial, only qualified
19 applicants are admitted to the Naval Academy. Now, in making
20 qualification recommendations, the board may make adjustments
21 to the whole-person multiple through what are known as
22 recommendations of the board.

23 **THE COURT:** So I'm just clear, your proffering the
24 evidence is going to be that, as to WPM, whole-person
25 multiplier, race and ethnicity have no role whatsoever at that

1 determination?

2 **MR. GARDNER:** The evidence will show that race or
3 ethnicity is not a basis to provide points to the whole-person
4 multiple. That is correct. You will see documentary evidence
5 to that effect, and Dean Latta will testify accordingly.

6 You will hear a lot about RABs during trial, Your Honor.
7 Again, race and ethnicity are not RABs that the board can
8 apply. In fact, directly to Your Honor's point, Plaintiff's
9 Exhibit 28, "The guidance provided to the admissions board is
10 explicit that at no point during the admissions process should
11 race, ethnicity, or gender be a basis for points in favor of or
12 against an applicant. Such factors may only be considered as
13 one of the many nondeterminative factors in the applicant's
14 file."

15 And Dean Latta will explain that, based on his years
16 working in the admissions office, the board follows this
17 guidance.

18 Now, Your Honor, some RABs are automatic.

19 **THE COURT:** What does RABs stand for again?

20 **MR. GARDNER:** Recommendations of the admissions board.

21 **THE COURT:** Okay. Good. Thank you.

22 **MR. GARDNER:** And what the evidence will show is that
23 some of these recommendations of the admissions board are
24 automatic, but most are manual and require judgment. This
25 includes things like interest in STEM, teacher recommendations,

1 life experience, hardship, personal statements.

2 Now, one quick observation, which I'll return to later.
3 Many of these RAB adjustments expressly reflect race-neutral
4 alternatives, such as socioeconomic background. As the
5 evidence will show, there is no RAB category for race and
6 ethnicity, and points on race and ethnicity are expressly
7 prohibited.

8 Now, Your Honor, as I mentioned, the admissions board does
9 not select candidates for admission to the Naval Academy.
10 That's the job of the slate review committee. The slate review
11 committee is comprised of the dean of admissions and his senior
12 staff, the director of nominations and appointments and the
13 director of candidate guidance.

14 You'll hear from the director of nominations, Melody
15 Hwang, during this trial. As I mentioned earlier, the
16 congressional nominations and their corresponding congressional
17 slates drive the process for filling the class. Dean Latta
18 will explain that the slate review committee seeks to fill at
19 least one vacancy for each member of Congress and may fill two
20 or more vacancies for a given member depending on class size
21 limitations.

22 Now, earlier I mentioned the three types of nominations.
23 When a member of Congress designates a principal nominee who is
24 otherwise fully qualified, the Naval Academy must -- must --
25 offer an appointment to that candidate before considering other

1 candidates on the slate.

2 For those nominated under the competitive method, the
3 Academy generally offers an appointment to the fully qualified
4 nominee on the slate --

5 **THE COURT:** So, again, Mr. Gardner, in terms of what
6 you're proffering will be the evidence in the case, it's within
7 the discretion of the member of Congress as to which method to
8 employ, correct?

9 **MR. GARDNER:** Correct, Your Honor.

10 **THE COURT:** I mean, there's no control over any member
11 of Congress by the military in terms of whether it's any which
12 one of the three methods; they're free to pick whichever one
13 they want?

14 **MR. GARDNER:** Correct. Congress --

15 **THE COURT:** As long as they're applied consistently.

16 **MR. GARDNER:** I'm not even sure that's a requirement.
17 Congress can dictate whether to nominate people or not nominate
18 people, how to go about the nominations process. It is
19 completely within the control of Congress, and the Naval
20 Academy has no control over that.

21 So for those nominated under the competitive method, the
22 Academy generally offers an appointment to the fully qualified
23 nominee on the slate with the highest whole-person multiple.
24 When the highest WPM score on the slate are close, the slate
25 review committee may review the two records side by side to

1 look at all aspects of the candidate's file.

2 On occasion and based on that holistic review of the
3 entire application, the slate review committee may make the
4 candidate with the relatively lower whole-person multiple the
5 slate winner. That is one place where the slate review
6 committee may consider the candidate's race or ethnicity as one
7 of numerous factors reflected in the candidate's file. It
8 provides context to a candidate's application just, like myriad
9 other pieces of information provide context.

10 Now, importantly, Your Honor, even where the candidate
11 with the highest whole-person multiple isn't the slate winner,
12 that's not the end of the story for that candidate. And that
13 candidate often will still be offered an appointment. One way
14 is as a qualified alternate.

15 That is where, by statute, the Naval Academy must offer
16 appointments to candidates with the top -- it used to be 150,
17 now it's 200 -- top 200 whole-person multiple scores after
18 deciding all slate winners.

19 The Court will hear testimony that, where the qualified
20 candidate with the highest whole-person multiple who was
21 nominated under the competitive method did not win the slate,
22 that candidate is often offered an appointment as a qualified
23 alternate. The decision to appoint someone as a qualified
24 alternate is based solely on their whole-person multiple score,
25 and all qualified alternates must have a congressional

1 nomination.

2 The other way to get an offer is to be an additional
3 appointee. Those are slots that remain once the congressional
4 slates and qualified alternate slots are filled. This is
5 another place where the slate review committee may consider a
6 candidate's race or ethnicity as part of a holistic review of
7 all the information in the file.

8 By way of context, for the class of 2027, 62 percent of
9 the additional appointees were White. Again, to demonstrate
10 the significance of the congressional nomination process, at
11 least 75 percent of additional appointees must have
12 congressional nominations. And last year, 100 percent of them
13 had congressional nominations.

14 So I've mentioned now, Your Honor, two places where race
15 can be used in the admissions process: Nominations using the
16 competitive method where the top two candidates have close
17 whole-person multiples and additional appointees.

18 There's two other places. One is the letter of assurance
19 process. A letter of assurance is the Naval Academy's version
20 of early action. And it's a way for the Academy to compete
21 with other schools for top talent. Many blue-chip athletes --
22 those are the recruited athletes, primarily football and
23 basketball -- received letters of assurance.

24 A candidate's race or ethnicity can be considered as part
25 of a holistic assessment in the letter of assurance process,

1 but letters of assurance are conditional. The candidate still
2 needs to complete every admissions requirement, including
3 obtaining a nomination. If they don't, their letter of
4 assurance is withdrawn.

5 The last place where race can be considered is actually
6 entirely hypothetical. Theoretically, it could be considered
7 as one of the many nondeterminative factors in extending
8 superintendent nominations. The evidence will show, however,
9 that for at least the last 15 years, race and ethnicity have
10 not been a factor in extending superintendent nominations.

11 So, Your Honor, having explained the limited ways in which
12 race is considered in the admissions process, let me now turn
13 to how race is not used.

14 The evidence will show that, in terms of making
15 qualification decisions, consideration of race and ethnicity
16 play no role at all. The evidence will also show that no
17 unqualified applicants are admitted to the Academy. The
18 evidence will also show that the Naval Academy does not use
19 quotas. It does not give extra points for race.

20 And the evidence will show that the Naval Academy does not
21 balance its classes based on race. In fact, the evidence will
22 show fluctuations in the share of racial groups year after
23 year.

24 The evidence will show that, due to the congressional
25 nominations process and the whole-person multiple score, race

1 is not considered at all for many appointments to the Academy.

2 The evidence will show that the limited -- in limited
3 circumstances where race is considered, it's not considered in
4 isolation; rather, it is used to inform an applicant's overall
5 file as part of a holistic consideration of the applicant. No
6 candidate, Your Honor, is admitted solely because of their
7 race.

8 And the evidence will show that admissions decisions are
9 not based on stereotypical assumptions about how minority
10 students may think or act.

11 Now, as reflected during its opening statement,
12 plaintiff's case largely rests on a statistical analysis from
13 one of its expert economists who concludes, among other things,
14 that race plays an outsized role in the admissions process.

15 Plaintiff's expert acknowledges that admissions rates are
16 roughly the same across races and ethnicities, but plaintiff's
17 expert claims that minorities who are admitted to the Academy
18 have comparatively lower academic qualifications and
19 whole-person multiple scores when compared to nonminority
20 students.

21 Two very quick points here, Your Honor. First, we will
22 present testimony from our expert economist, Dr. Stuart Gurea,
23 that plaintiff's expert analysis is deeply flawed and likely
24 substantially overstates the role race plays in the admissions
25 process.

1 Second, even accepting everything plaintiff's expert
2 economist tells you, his analysis tells you virtually nothing
3 about how race and ethnicity are actually used in the
4 admissions process, let alone what the racial and ethnic
5 composition at the Naval Academy would look like in the absence
6 of the limited consideration of race.

7 Now, I do want to mention a few other quick brief points
8 in light of what my colleague said this morning.

9 Throughout this litigation and indeed today, plaintiff has
10 claimed both that the Naval Academy needs an end date for its
11 consideration of race and that it lacks any concrete end date.

12 Plaintiff is doubly wrong. No court has ever held that
13 national security has an end date. Plaintiff has failed to
14 identify a single case or holding. And the reasons for the
15 absence of such authority is obvious. The Supreme Court has
16 repeatedly forbidden courts from substituting their own
17 assessment for the executive branch's predictive judgments on
18 military personnel decisions.

19 Second, even if an end date were required in this context,
20 the Naval Academy has one. The testimony will show -- and
21 plaintiff acknowledged this today -- that the Naval Academy
22 intends to discontinue the consideration of race when it can
23 achieve and maintain a racially diverse class that is
24 reflective of the racial demographic of the general population.
25 And the Naval Academy is making significant progress in

1 increasing the diversity of its classes.

2 Let's take a look at Plaintiff's Exhibit 31. As reflected
3 in Plaintiff's Exhibit 31, which there's no objection to, the
4 Naval Academy has increased the diversity of its classes from
5 about 24 percent diverse for the class of 2006 to nearly
6 41 percent diverse for the class of 2026. But the Naval
7 Academy isn't yet there for certain minority groups, such as
8 African Americans and Hispanics. In fact, the representation
9 is lagging far behind the demographics of the general
10 population.

11 As my colleague alluded to earlier, the evidence will show
12 that, although Black individuals make up approximately
13 14 percent the general population, just 7 percent of the Naval
14 Academy class of 2027 was Black. Similarly, although Hispanic
15 individuals make up approximately 20 percent of the population,
16 they accounted for approximately 15 percent of the Naval
17 Academy's class of 2027.

18 So the Naval Academy isn't where it wants to be yet, but
19 the substantial progress it's achieved is definitely
20 translating into increased diversity among Navy and Marine
21 Corps officers.

22 And I want to draw your attention, Your Honor, because you
23 had asked about this specifically. This is DX59. As Stephanie
24 Miller, the deputy assistant secretary of defense for military
25 policy, will testify and the data will show, there has been an

1 upward trend in the number of minority officers accessing into
2 the Navy from the Naval Academy over the past two decades.

3 In fact, what the evidence will show is that, in terms of
4 long-term retention -- and, Your Honor, this is the 15-year
5 retention mark I think you were just asking about -- the
6 military actually retains minority officers longer than
7 nonminority officers.

8 So at bottom, Your Honor, while efforts to increase the
9 diversity of both the Naval Academy and ultimately the officer
10 corps may be relatively slow, the evidence will show that real
11 progress is being made; we just aren't there yet.

12 The final point I want to make, Your Honor, is about the
13 use of race-neutral alternatives. The Naval Academy fully
14 acknowledges that, before it may consider race in the
15 admissions process, it must first implement workable
16 race-neutral alternatives, and only if those race-neutral
17 alternatives are unsuccessful in achieving the level of
18 diversity it seeks may it turn to the consideration of race.

19 The evidence will show both that the Naval Academy has
20 employed numerous race-neutral alternatives and that, even with
21 those alternative, the Academy has been unable to achieve the
22 level of racial diversity it seeks.

23 Briefly, Your Honor, here's a few examples.

24 Looking at Defendants' Exhibit 162, which, again, has not
25 been objected to, we've got candidate visit weekends. That's

1 where the Academy brings in prospective students to see campus
2 because it gets them more engaged. They especially try to
3 bring in minority students.

4 We've got remote STEM, summer STEM camp, mini STEM, summer
5 seminar. These are all additional outreach efforts to reach
6 and engage prospective students with a focus on diverse
7 representation. We've got school visits, admission forums, op
8 info, mini op info, college week live. These are all more
9 outreach efforts to reach and engage students where they are.
10 And the Naval Academy puts a lot of work into targeting
11 underrepresented areas and populations.

12 We've got conferences, the CIO conferences, which refer to
13 Center of Influence conferences. This engages schools,
14 teachers, guidance counselors, the people who can actually
15 influence their students to learn about and get interested
16 about the Naval Academy.

17 Again, there is a lot of work that goes on in terms of
18 targeting underrepresented populations.

19 And then we've also got congressional academy days. And
20 that's where the Naval Academy puts a lot of resources into
21 educating members of Congress on the importance of nominating
22 students and being inclusive in their nominations. And the
23 Court will hear even more testimony about additional outreach
24 efforts covering social media, advising, marketing, and more.

25 Now, you will hear testimony in this case that the Naval

1 Academy can only do so much outreach given the real-world
2 budget constraints it faces. After all, as part of the
3 military, the Naval Academy is a federally funded institution.
4 And admissions is just one of a number of cost centers at the
5 Academy. Nevertheless, the evidence will show that the Naval
6 Academy spends millions of dollars on outreach efforts and
7 spends that money strategically.

8 The Court will also hear evidence about race-neutral
9 alternatives that the Naval Academy employs directly in its
10 admissions system, things like working with minority applicants
11 to encourage them to complete their applications, things like
12 giving additional points to factors like socioeconomic
13 background, adversity, unusual life experience,
14 first-generation college status, first-generation American
15 status, and English as a second language; things like giving
16 particular consideration to applicants from the enlisted ranks,
17 known as the fleet, and applicants from underrepresented
18 districts and recruited athletes, all of whom tend to have
19 greater minority representation.

20 Your Honor will see there's a tremendous breadth to the
21 race-neutral alternatives the Naval Academy has considered and
22 built into its process. And yet plaintiff claims the Naval
23 Academy hasn't done enough. Plaintiff argues that the Naval
24 Academy has never conducted a formal statistical analysis to
25 figure out if it can rely only on race-neutral alternatives.

1 There are two fundamental flaws with plaintiff's argument.
2 The first is that the Naval Academy is seeking to increase the
3 level of diversity in its classes rather than maintain the
4 status quo. As I mentioned, particularly with respect to Black
5 and Hispanic students, representation is far below the general
6 population goal.

7 And it doesn't take a statistical analysis, Your Honor, to
8 show that, when race and race-neutral factors are used and the
9 Naval Academy cannot reach its goal, barring the consideration
10 of race is not going to increase the share of minority students
11 at the Academy.

12 The other fundamental flaw in plaintiff's theory is that
13 the Naval Academy doesn't need to undertake a statistical
14 analysis to see what it observes every admissions cycle. Every
15 cycle, applications come in as the result of the Naval
16 Academy's many race-neutral alternatives. Every cycle,
17 applications are completed and whole-person multiple scores are
18 assigned and adjusted as a result of additional race-neutral
19 alternatives.

20 Yet every cycle, Your Honor -- every cycle -- the Naval
21 Academy has seen at that point that it cannot achieve the
22 racial diversity it seeks simply by relying on those
23 race-neutral factors. Why does it need to hire a statistician
24 to confirm what it experiences every single cycle?

25 Now, you also heard plaintiff's counsel say during his

1 opening that they intend to call an expert in race-neutral
2 alternatives, Mr. Kahlenberg, to opine that the Navy could do
3 more in terms of race-neutral alternatives. But, Your Honor,
4 the key here is that it has to be workable. The evidence will
5 show that Mr. Kahlenberg's suggestions either are already being
6 used by the Naval Academy or are not workable.

7 For example, Mr. Kahlenberg actually suggests that the
8 military lobby Congress -- lobby Congress -- to change the law
9 requiring congressional nominations. As a matter of fact and
10 law, Your Honor, that cannot possibly be a workable
11 race-neutral alternative.

12 Your Honor, the evidence will show that the Naval
13 Academy's limited consideration of race to increase the number
14 of well-qualified officers who will go on to become the
15 nation's senior military leaders is narrowly tailored to meet
16 the military's critical national security interest.

17 Plaintiff will be unable to meet its burden to show that
18 the military has violated the Fifth Amendment, and we will
19 request at the close of trial that judgment be entered in favor
20 of the defendants.

21 Thank you.

22 **THE COURT:** Thank you very much, Mr. Gardner. And
23 with that -- and thank you, Counsel, for those opening
24 statements.

25 And, Ms. Thomas, we'll take a recess here. We'll take

1 about a 10-minute recess, and then we will start with our first
2 witness. I believe General Walker will be the first witness.

3 My thought is let's take about a 10-minute recess, and
4 then we'll go for maybe an hour, and then we'll break for lunch
5 for an hour.

6 Does that work for you, Ronda?

7 **THE COURT REPORTER:** Yes, Your Honor.

8 **THE COURT:** Okay. Good. So we'll take a 10-minute
9 recess.

10 (A recess was taken from 12:00 p.m. to 12:19 p.m.)

11 **THE COURT:** We may continue. With that, Mr. Mortara,
12 we're bringing in General Walker as the first witness; is that
13 right?

14 **MR. MORTARA:** Your Honor, Mr. Connolly. Michael
15 Connolly would like to call --

16 **THE COURT:** All right. Nice to see you. If you'll
17 come forward, please.

18 **THE CLERK:** Good afternoon, sir. Please raise your
19 right hand.

20 (Witness sworn.)

21 **THE CLERK:** Please adjust the microphone so that
22 you're speaking directly into it. If you don't mind stating
23 and spelling your first and last name for the record.

24 **THE WITNESS:** Christopher S. Walker,
25 C-H-R-I-S-T-O-Mike Pusterla-H-E-R, W-A-L-K-E-R.

1 **THE CLERK:** Thank you.

2 **THE COURT:** You may proceed, Mr. Connolly.

3 **MR. CONNOLLY:** Thank you. Before we begin, I have
4 copies of the two exhibits that we're going to seek to offer
5 through General Walker and I'd like to bring to the witness and
6 to the Court.

7 **THE COURT:** That's fine.

8 Ms. Herndon will give this back to my law clerk. You'll
9 be putting these up on the screen, obviously, Mr. Connolly,
10 correct?

11 **MR. CONNOLLY:** Yes.

12 **DIRECT EXAMINATION**

13 **BY MR. CONNOLLY:**

14 **Q.** Good morning. Could you please state your name.

15 **A.** Brigadier General Christopher S. Walker, retired.

16 **Q.** What was your previous employment?

17 **A.** I was a career officer in the United States Air Force in
18 the West Virginia Air National Guard. And I've -- I was in
19 uniform for 40 years, 2 1/2 months.

20 **Q.** Do you have any combat experience?

21 **A.** Lots.

22 **Q.** Where did you see combat?

23 **A.** I saw combat in the Balkans. I saw combat in Afghanistan
24 and combat in Iraq.

25 **Q.** Have you ever been deployed overseas?

1 A. Numerous times.

2 Q. Approximately how many countries have you been deployed
3 to?

4 A. I've lived and been deployed to over 20 countries and then
5 flown Air Force missions into another 40.

6 Q. Even though you're a member -- or you were previously with
7 the Air Force, are you qualified to talk about the Navy and the
8 military as a whole?

9 A. Absolutely.

10 Q. Why are you qualified to talk about the Navy and the
11 military as a whole?

12 A. I'm a general officer, or at least I was. But once a
13 general, always a general. And any general officer and flag
14 officer worth their salt will not only know their service but
15 they'll be intimately knowledgable about every other service's
16 weapons, employment, capabilities, and how they employ their
17 forces.

18 Q. Do you have any other qualifications that would allow you
19 to speak about the Navy and the military as a whole?

20 A. Oh, yes, yes. I'm a Level III joint qualified officer.

21 Q. And what is a Level III joint qualified officer?

22 A. I'll give you a quick history. Back in 1986, the
23 Goldwater-Nichols Act totally changed the Department of
24 Defense, where the Joint Chiefs of Staff -- the chief staff of
25 the Air Force, CNO, commandant of the Marine Corps -- they were

1 no longer in the chain of command when it came to battle. That
2 was given to functional and geographic combatant commanders who
3 report directly to the Secretary of Defense. And the Joint
4 Chiefs of Staff do the training and equipping for those
5 combatant commanders.

6 With that being said, all general officers and flag
7 officers were required to be joint qualified before they could
8 reach 07 and above.

9 Q. How does someone become a Level III joint qualified
10 officer?

11 A. It's a combination of experience -- what we call joint
12 experience, either being in what they call a joint billet, a
13 JDAL billet, or having experience with -- in a joint
14 environment that you can later put forth to the joint office in
15 the Pentagon for them to judge whether you'll get those points.
16 And 36 points means 3 points per month of doing that sort of
17 work.

18 In addition, the officer has to have joint professional
19 military education, JPME, from an institution that gives
20 Level II JPME credit.

21 Q. Why does the military want officers to achieve joint
22 qualified status?

23 A. Because in our way of warfare, it will not work if the
24 services plan war on their own. We'll get redundancies. We'll
25 get -- we'll get things really, really wrong. So having joint

1 qualified officers, they're actually able to command soldiers,
2 Marines, airman, guardians, sailors -- all of them -- without
3 having to rely on somebody from that particular service to do
4 the commanding.

5 And right after -- so after this act was enabled in 1986,
6 the first time we put it into action was for the Gulf War in
7 1991. And it worked pretty well. We cut through the Iraqi
8 Army like a hot knife in butter.

9 Q. Were you hired to provide testimony in this case?

10 A. Yes.

11 Q. What issue will you be addressing with your testimony?

12 A. Broadly, I'll be testifying as to whether racial diversity
13 and even racial proportioning will enhance the effectiveness
14 and lethality of our armed forces. Yeah, and also -- yes, yes,
15 that's broadly it.

16 Q. Did you reach any conclusions?

17 A. Oh, yes. Oh, yes.

18 Q. And what were your conclusions?

19 A. Well, I concluded that racial diversity has little to
20 nothing to do with the lethality and effectiveness of our armed
21 forces. And I also concluded that our armed forces would not
22 get any more or less lethal if the Naval Academy stopped using
23 racial preferences.

24 Q. So we'll come back to these conclusions a little later in
25 your testimony. First, I want to ask you a little bit more

1 about your background.

2 When were you born?

3 A. 4th of August 1965.

4 Q. Where did you grow up?

5 A. Jamaica, Queens, New York City.

6 Q. Where were your parents from?

7 A. My parents were actually from the island of Jamaica, the
8 country. My father came to the country in 1957; my mother in
9 1959.

10 Q. Did you attend college?

11 A. I did, yes.

12 Q. Where did you attend college?

13 A. First I went to the United States Air Force Academy
14 Preparatory School, and then I attended the United States Air
15 Force Academy.

16 Q. Why did you want to go to the Air Force Academy?

17 A. Every since I was probably 5 years old, I wanted to fly
18 airplanes. And I didn't have that kind of money growing up; so
19 I figured, okay, the only way I'm going to be able to do this
20 is the military will have to teach me.

21 And at that time I did not know that the Navy, Marines,
22 and Army all have aviation. In my mind, I said Air Force,
23 airplanes; that's where I'm going to go.

24 Q. When did you graduate from the Air Force Academy?

25 A. 1988.

1 Q. What was the first squadron that you joined after
2 graduating?

3 A. After flight training, my first operational squadron was
4 the 53rd Weather Reconnaissance Squadron, known as the
5 Hurricane Hunters, down in Biloxi, Mississippi.

6 Q. What was your primary mission with the 53rd?

7 A. Crazy as it sounds, our mission was to fly into
8 hurricanes; and our secondary mission was air sampling.

9 Q. Were these missions dangerous?

10 A. Oh, yes. Oh, yes. Matter of fact, the 53rd Weather
11 Reconnaissance Squadron is now in the reserves, but they're
12 still the only Air Force unit that is authorized to fly into
13 thunderstorms and hurricanes.

14 Q. Were your missions important for the people on the ground?

15 A. Oh, very much so.

16 Q. How were they important?

17 A. We would give -- we would fix the location of the eye. We
18 would measure wind speed at the eye wall, and we'd measure wind
19 speed throughout the radius of the hurricane. And we would
20 also measure the air pressure to determine whether the storm
21 was strengthening or weakening. And we'd give all of that
22 information to the National Hurricane Center, which is part of
23 the National Weather Service which is part of NOAA.

24 But what they would do is they would warn the respective
25 governors who might be impacted by this storm so that they

1 could do whatever emergency preparations they needed to do.

2 Q. How many officers were in your squadron?

3 A. Around 55.

4 Q. Of these officers, do you recall how many were Black?

5 A. Oh, yes. I was the only one.

6 Q. Did the racial makeup of your squadron impact its
7 effectiveness?

8 A. Not one bit.

9 Q. How long were you with the Hurricane Hunters?

10 A. June of '89 to June of '91; so about two years.

11 Q. And what was your next assignment?

12 A. I was sent to the 50th Airlift Squadron, the Red Devils,
13 at Little Rock Air Force base.

14 Q. When were you part of this squadron, were you ever
15 deployed overseas?

16 A. Oh, many, many times.

17 Q. What was your first deployment?

18 A. First deployment was to King Abdulaziz Air Base in
19 Dhahran, Saudi Arabia, and they had us up in the Khobar Towers,
20 which were subsequently blown up. But that was a -- you know.

21 Q. Were you deployed anywhere else when you were part of the
22 50th?

23 A. Twice to the United Kingdom, once to Germany, once to
24 Italy, once to Kenya flying humanitarian missions into Somalia,
25 which eventually turned kinetic, and South and Central America,

1 Honduras and Panama.

2 Q. Can you give me an example of some of the combat missions
3 that you would be conducting as part of these deployments?

4 A. In the Balkans we would be applying to airfields like
5 Sarajevo, Split, Zadar, Mostar. And when we're flying in
6 there, we'd go through our combat entry checklist, make sure we
7 have our personal protective gear on. And we'd land most of
8 the time doing engine running offload so that we could get out
9 of there quickly before getting shot up.

10 Q. Do you recall how much officers were in your squadron?

11 A. 50th. About 60.

12 Q. Of these, do you recall how many of the officers were
13 Black?

14 A. Three.

15 Q. Did the racial makeup of your squadron impact its
16 effectiveness?

17 A. Not one bit.

18 Q. How long were you with the 50th?

19 A. I'd say three and a half years because I left there in
20 January of '95.

21 Q. And after your time with the 50th, what was your next
22 assignment.

23 A. With the 36th Airlift Squadron at Yokota Airbase, Japan,
24 near in Tokyo.

25 Q. Did you enjoy your time with the 36th?

1 A. Oh, that was the best time of my life.

2 Q. How come?

3 A. First of all, it was my first time in East Asia, and I got
4 to visit countries that I would have never, ever seen but for
5 the Air Force and got to see cultures that I did not experience
6 in New York City growing up -- Singapore, Indonesia, Malaysia,
7 Thailand, Laos, Cambodia, Vietnam, Korea, Australia,
8 New Guinea, et cetera.

9 Q. What type of missions were you doing as part of the 36th?

10 A. Thankfully, there's no conflict on that side of the world;
11 so mainly airlift missions and joint training missions with the
12 Army and Marines.

13 Q. What was your next assignment after you finished with the
14 36th?

15 A. My next assignment was to the 167th Airlift Wing in
16 Martinsburg, West Virginia, under the West Virginia Air
17 National Guard.

18 Q. And what year did you join the 167th?

19 A. That was April of '97.

20 Q. What was your first combat deployment as part of this
21 squadron?

22 A. The first one was back to Germany, again flying into the
23 Balkans doing those same sorts of missions.

24 Q. After the Balkans, were you deployed to any other combat
25 zones?

1 A. Oh, yes, yes.

2 Q. Were where you deployed next?

3 A. Next deployment was to Masirah Island, Oman, where we were
4 flying missions into Afghanistan.

5 Q. Besides Afghanistan, did you fly any combat missions
6 anywhere else in the Middle East?

7 A. Then 2003 is when the invasion of Iraq happened. And so
8 we had to start flying into Iraq, which was a little dicier
9 because they have much better -- had much better surface-to-air
10 missiles and antiaircraft artillery.

11 Q. Were you ever stationed in Iraq?

12 A. As a matter of fact, yes.

13 Q. Where in Iraq were you stationed?

14 A. I was assigned -- so while I was flying those combat
15 missions over there, my -- the person who was also my assistant
16 adjutant general and commander of West Virginia Air National
17 Guard, General Speedy Lloyd, was at the 609th Combined Air
18 Operations Center in Qatar as the director of mobility forces.
19 And he called me up down in Masirah and said, "Hey, Mookie, I
20 need you up here because we're going to send you into Baghdad."

21 I thought, what? For a mission?

22 He goes, "No. You're going to stay on the ground there."

23 And so I was in Baghdad from August of 2003 to August of
24 2004.

25 Q. Which branches of the military were you working with in

1 Baghdad?

2 A. I was sent there to work with the Coalition Provisional
3 Authority, as they called it, the CPA. And my particular team
4 was the Ministry of Transportation team. There, we had Army,
5 Navy, Coast Guard, other Air Force officers, FAA civilians, a
6 couple of civilians who were railroad experts, and a couple of
7 civilian lawyers.

8 Q. Did you ever have to undertake any dangerous missions in
9 Baghdad?

10 A. Every day.

11 Q. Can you give us an example of a regular mission that you
12 would have to undertake?

13 A. We were -- our main office was in the Green Zone, and
14 that's also where we slept. But most of my work and a few
15 other of my teammates there on that team, our work was at
16 Baghdad International Airport. So just about every day we had
17 to drive down Route Irish and hope we wouldn't encounter an IED
18 or get shot up.

19 Q. How often would you take these trips?

20 A. Just about every day. And sometimes, even hairier, we
21 would have to drive into downtown Baghdad to meet with certain
22 Iraqi officials; so that was a little bit more dicey.

23 Q. For these trips, when you would choose the teams to go on
24 these missions, did the race of the service members with you
25 matter?

1 A. No, not at all.

2 Q. What were you concerned with when you were picking the
3 people to go on with you on these missions?

4 A. I was concerned who was a good driver and who was a good
5 shooter.

6 Q. How long were you stationed in Baghdad?

7 A. About a year.

8 Q. Can you think of any time when you were in Baghdad when a
9 person's race had any effect on your mission?

10 A. No.

11 Q. After Baghdad, what type of positions were you assigned?

12 A. My whole career had been operational to that point, and I
13 was a major then. And I thought it would be good if I got a
14 staff position somewhere. And so I worked hard to try and get
15 a staff position after that.

16 Q. What was your first major staff assignment?

17 A. As the crisis action team director at the Air National
18 Guard Readiness Center for the National Guard Bureau.

19 Q. And what was the operation you were conducting in this
20 role?

21 A. At that time we called it Operation Jump Start.

22 Q. What was Operation Jump Start?

23 A. That was -- back -- President Bush asked the National
24 Guard to supplement and augment the border patrol, to kind of
25 tighten things up at the border, at the southern border.

1 Q. And what were your responsibilities as the director for
2 this operation?

3 A. I directed and managed a large number of airmen who were
4 experts in various fields like finance, medical, aeromedical
5 evacuation, aviation, logistics, security, IT, and so on. And
6 what we would do -- what they would do is scour the United
7 States for National Guard members who could be sent -- would
8 volunteer and be sent to the border to help the border patrol.

9 Q. How many people were under your direction?

10 A. Around 60.

11 Q. How did you choose which individuals from the National
12 Guard to assign to each mission?

13 A. We -- we looked for people who had the skills and the
14 qualifications.

15 Q. In your role, did you ever assign people to particular
16 missions because of their race or ethnicity?

17 A. No.

18 Q. What was your next position after serving in this role
19 with Operation Jump Start?

20 A. Then I was -- I had the fortune of becoming the 103rd Air
21 Mobility Operations squadron commander, that was an 06
22 position.

23 Q. In this position, were you ever deployed in combat?

24 A. Yes.

25 Q. Where were you deployed?

1 A. I was deployed in the 609th Combined Air Operation Center,
2 the CAOC, in Qatar.

3 Q. And what missions were you conducting from Qatar?

4 A. I was the deputy Air Mobility Division chief and at times
5 acting Air Mobility Division chief. And what we would do there
6 would be to plan and execute airlift missions into Afghanistan
7 and Iraq.

8 Q. Around what year was this happening?

9 A. 2010.

10 Q. How many people were under your direction?

11 A. Under my direction at the CAOC, about 60 because it was a
12 24/7 operation.

13 Q. In your leadership role, did your race ever matter to how
14 effective your unit was?

15 A. No.

16 Q. What was your next position?

17 A. My boss, who was the 103rd Air Operations Group commander,
18 retired, and I was fortunate enough to replace him as the
19 commander of the 103rd Air Operations Group.

20 Q. In this position were you ever deployed in combat?

21 A. Oh, yes.

22 Q. And where were you deployed?

23 A. Right back to the 609th CAOC doing the same thing, being
24 an Air Mobility Division chief.

25 Q. What was your next position after you served as the

1 commander of the 103rd Air Operations Group?

2 A. I went back to another staff position. I started off as
3 the acting division chief for Air Mobility Operations for the
4 Air National Guard.

5 Q. And were you ever appointed to this position on a
6 permanent basis?

7 A. About three months later, they had a competition for that
8 position, and I won. So I was permanently assigned.

9 Q. When you were in this position, were you ever deployed
10 into combat?

11 A. No. This was a staff position. We sort of frown on staff
12 people getting deployed unless there's a good reason. Maybe if
13 they're getting deployed to a command position that will
14 enhance that career. But, otherwise, we need them doing the
15 staff work.

16 Q. What were your responsibilities in this role?

17 A. The care and feeding and also, in conjunction with the
18 active-duty Air Force, developing policies and procedures for
19 air mobility units in the Air National Guard. So any Air
20 National Guard C130 units, C17 units, tanker units -- back then
21 we had C5s in the Guard as well -- and contingency response
22 units. I took care of all of those around the United States.

23 Q. In your leadership role, did your race matter for how
24 effective you were in this position?

25 A. Not one bit.

1 Q. What was your next assignment?

2 A. After that, I was elevated to being the deputy director of
3 operations for the Air National Guard.

4 Q. What was your role in this position?

5 A. Similar to what I did with the Air Mobility Division,
6 except now, under my purview were fighters, bombers, special
7 operations, search and rescue, cyber, remotely piloted
8 aircraft -- or drones, for the Court -- and any operational
9 mission that the Air National Guard had.

10 Q. How many people were under your direction?

11 A. At this time, 150 or more.

12 Q. And what was your next position?

13 A. After that, I was force-developed to the National Guard
14 Bureau joint staff in their J8.

15 Q. What does it mean to be force-developed?

16 A. At a certain time in officer's careers, if the superiors
17 feel that they want to groom that officer for greater
18 responsibilities and higher rank, they try to increase the
19 breadth of knowledge of that officer. Me, I'd been operational
20 all of my life. So I was force-developed into this position so
21 that I would get a better idea of the other parts of the
22 military.

23 Q. What were your responsibilities in this new role?

24 A. There I was the division chief for United States Property
25 and Fiscal Officer operations. So I oversaw 54 06 colonels,

1 both Air Force and Army, around the United States who
2 represented each state, each territory, and the District of
3 Columbia; so 54 of them.

4 And they were charged with ensuring that the federal money
5 given to the states, the Title X money given to the states, was
6 used in accordance with congressional authorization so we could
7 avoid any Antideficiency Act violations.

8 Q. And what was your next position?

9 A. After that I was really, really blessed to become the
10 chief of staff of the West Virginia Air National Guard.

11 Q. And do you recall approximately the year when that
12 happened?

13 A. That was December of 2016.

14 Q. And when you took this position, did your rank change?

15 A. Oh, yes. That was an 07 position, and I was subsequently
16 promoted to brigadier general.

17 Q. In this position as the chief of staff, what were your
18 responsibilities?

19 A. I was to support the assistant adjutant general and
20 commander of the West Virginia Air National Guard in developing
21 policies for the entire West Virginia Air National Guard.

22 Q. And how long were you in that position?

23 A. About two years.

24 Q. And what was your next assignment?

25 A. Then I was promoted up to be the assistant adjutant

1 general and commander of the West Virginia Air National Guard.

2 Q. And in this role as the assistant adjutant general and
3 commander of the West Virginia Air National Guard, what were
4 your responsibilities?

5 A. Then I had command authority over all of the -- all of the
6 airmen in the West Virginia Air National Guard. And I would
7 direct policies, and I would direct the way I wanted them to
8 train. And at that time I was directing them to get ready for
9 China.

10 Q. How many people did you have under your command in this
11 role.

12 A. 2,200. Yeah, about that.

13 Q. What was your next position?

14 A. After that I was assigned to be the senior military
15 adviser to the secretary of the Air Force's Office of Diversity
16 and Inclusion.

17 Q. Do you recall approximately what year you accepted that
18 position?

19 A. That was exactly -- I went on orders February 28th, 2021.

20 Q. And when you were the senior military adviser to the
21 secretary of the Air Force Office of Diversity and Inclusion,
22 where was this position located?

23 A. In the Pentagon.

24 Q. And what was your role in this position?

25 A. As an adviser, I had no decision-making authority. But

1 what I would do is assist and give my opinion on various
2 policies that were coming up regarding diversity and inclusion
3 in the Air Force. When I say Air Force, total force, meaning
4 active-duty Air Force, Air Force Reserves, and Air National
5 Guard.

6 Q. Can you give me an example of something your office did
7 when you were there.

8 A. Well, one of our accomplishments was changing or even
9 getting rid of certain height requirements for being on an air
10 crew.

11 Q. And why was that something that your office was focused
12 on?

13 A. Well, it really, really disproportionately affected women
14 who might have wanted to be pilots, load masters, flight
15 engineers, navigators. And so that was brought to us by lots
16 of folks complaining about it. And so we sought to figure out
17 whether that actually made sense to have these height
18 restrictions.

19 Q. And was -- what happened to the policy in the end?

20 A. Oh, well, we found that it was a barrier, and it was an
21 unnecessary barrier because some of -- many of those women
22 could reach any of the controls, that -- former aircraft that
23 we had, maybe they couldn't have, but modern aircraft it was
24 much less of a factor.

25 Q. When you were in the Office of Diversity and Inclusion,

1 did you ever review studies and reports about diversity and
2 inclusion?

3 A. All the time.

4 Q. When you would review these reports, what were the types
5 of things you were looking for?

6 A. Me, I was looking for data, facts -- no feel-good stuff,
7 no wishful thinking -- only data and facts to support what
8 policy was being considered.

9 Q. And how long were you with the Office of Diversity and
10 Inclusion?

11 A. Over two years.

12 Q. What did you do after your position in the Office of
13 Diversity and Inclusion?

14 A. I retired.

15 Q. And when did you retire?

16 A. 1 October 2023.

17 Q. Why did you retire?

18 A. First, I had come up to my statutory -- what we in the Air
19 Force call the MSD, the mandatory separation date. Army and
20 Navy, I believe, call it the MRD, or mandatory removal date.
21 But I came up to that point.

22 And, secondly, after over 40 years in uniform, it was
23 enough. Enough is enough.

24 Q. What did you do after you retired?

25 A. I tried to actually really retire and relax, but that

1 didn't really work out.

2 Q. Did you do anything else after that?

3 A. About a month and a half to two months after I retired,
4 due to encouragement, maybe even cajoling, from friends within
5 the military and outside the military, I decided to run for
6 Congress.

7 Q. Why did you want to run for Congress?

8 A. Oh, my main reason was I did not think -- and I still do
9 not think -- that our military is prepared for China. And I
10 wanted to be able to be in Congress and hopefully get on the
11 House Armed Services Committee so that I could force a certain
12 thing through the NDAA for us getting prepared munition-wise,
13 training-wise, et cetera.

14 Q. Did you win the election?

15 A. I did not win my primary, no.

16 Q. Do you currently serve on any boards?

17 A. Oh, that's another reason why I'm not really retired.
18 But, yes, many.

19 Q. Can you tell us, what are the boards that you serve on?

20 A. Well, I was actually appointed by the Secretary of the Air
21 Force after I retired to the board of governors for the Civil
22 Air Patrol nationally. I'm the chair of two different charter
23 school boards in West Virginia. I'm on the board of directors
24 for the Clay Center for Performing Arts and Sciences of
25 West Virginia. I'm also on the foundation for the Bridge

1 Valley Community and Technical College.

2 Q. Are you a member of any organizations that have a military
3 focus?

4 A. Oh yes, yes.

5 Q. And what are those organizations?

6 A. American Legion, the National Guard Association of the
7 United States, and STARRS. That's Stand Together Against
8 Racism and Radicalism in the Services.

9 Q. Are you currently employed by the United States
10 government?

11 A. I am not.

12 Q. I want to turn to your methodology in this case.

13 A. Okay.

14 Q. The opinions that you formed in this case, what were they
15 based on?

16 A. They're based on 40 years in uniform, in combat many times
17 with varieties of people from all over the world and -- so 40
18 years of combat experience.

19 Q. Did you review any documents produced by the defendants in
20 this case?

21 A. I did, yes.

22 Q. Did you review any of the declarations or the expert
23 reports in this case?

24 A. I certainly did.

25 Q. In particular, did you review the declaration of

1 Dr. Jeannette Haynie?

2 A. I did.

3 Q. Did you review the declaration of Lisa Truesdale?

4 A. I certainly did, yes.

5 Q. Have you ever served in an admissions office in any of the
6 service academies?

7 A. No.

8 Q. Just generally, what do you know about the Naval Academy's
9 admissions process?

10 A. Well, first, I know from the filings in this case what
11 they have revealed.

12 Secondly, I served as a nomination -- on a nomination
13 board for Congressman Alex Mooney several times.

14 Third, for over 20 years each and every year, I'm
15 mentoring several young people from around the country to get
16 into either Annapolis, West Point, or the Air Force Academy or
17 any of them.

18 Q. What issues would you say that you are an expert in?

19 A. I'm an expert in military operations at the tactical,
20 operational, and strategic level and, quite honestly, because
21 of my last job, diversity and inclusion in the military.

22 **MR. CONNOLLY:** Your Honor, at this time we'd like to
23 offer General Walker as an expert on the issue of -- issues of
24 military operations at the tactical, operational, and strategic
25 level.

1 **THE COURT:** Any voir dire on this, Mr. Robinson?

2 **MR. ROBINSON:** No voir dire. We do note our objection
3 that we made in our motion in limine, which we understand the
4 Court --

5 **THE COURT:** Yes. I've overruled that. And that's
6 been overruled. You preserved it for appeal.

7 And you'll be so qualified as an expert with respect to
8 military operations and tactical operations.

9 **BY MR. CONNOLLY:**

10 **Q.** General Walker, did you prepare an opening expert report
11 in this case?

12 **A.** I did.

13 **Q.** Is it the document that is marked as Mike Pusterla517
14 that's in front of you?

15 **A.** That's it, yes.

16 **Q.** Did you prepare a rebuttal expert report in this case?

17 **A.** I did.

18 **Q.** And is your rebuttal report the document that is marked as
19 Mike Pusterla224?

20 **A.** That is it, yes.

21 **Q.** Do these reports contain the opinions that you intend to
22 offer today?

23 **A.** Yes.

24 **MR. CONNOLLY:** Your Honor, at this time we would like
25 to offer into evidence Plaintiff's Exhibit 517 and Plaintiff's

1 Exhibit 224.

2 THE COURT: Any objection, Mr. Robinson?

3 MR. ROBINSON: Yes. Hearsay, Your Honor.

4 THE COURT: Is this for the same reason?

5 MR. ROBINSON: Hearsay, and we're happy to explain, if
6 you would like.

7 THE COURT: Well, the point is, to the extent there's
8 hearsay, I won't consider it. I'll just delete it out. So, I
9 mean, he's prepared his reports. He's been qualified as an
10 expert. We can wait and see what he has to say, and you can
11 object if he attempts to bring in hearsay.

12 I'm clearly cognizant, to the extent he's summarized the
13 views of others, it's not his role and will have no affect upon
14 me. You can't just bring in hearsay in terms of what people
15 told him. He's qualified as an expert as to his view.

16 But do you have specific portions of the expert reports
17 that you want to note for that or what?

18 MR. ROBINSON: So to be clear, two levels of hearsay.
19 So we do object to the hearsay within hearsay. He does
20 reference conversations he had with former members of the
21 military. We're happy to hold that objection until --

22 THE COURT: That's a running objection, and it won't
23 be considered. To the extent that he has said such-and-such
24 said whatever, that's clearly hearsay offered for the truth of
25 the matter asserted therein, and it's not accepted. He's

1 certainly free to testify as to his own views based upon
2 conversations with the military.

3 All of these military witnesses on both sides of the aisle
4 will be permitted to do so. And to the extent they venture
5 into a discussion with specificity as to who said what to whom
6 on what occasion, I'll deal with it on a *seriatim* basis. Each
7 side can note objections at to that. And I can tell you ahead
8 of time it'll be sustained.

9 General Walker is not qualified to summarize what people
10 have told him. He's clear to testify as an expert as to his
11 own views.

12 **MR. ROBINSON:** Understood. Thank you. So that's the
13 objection to the second level of hearsay.

14 We do have an objection to the report itself as hearsay.
15 As we explained in the motion in limine --

16 **THE COURT:** Which was denied previously.

17 **MR. ROBINSON:** I think it was denied pending how
18 plaintiff tried to use it at trial. So plaintiff in their
19 motion in limine opposition argued, well, even if it can't come
20 it for the truth, perhaps it could come in for impeachment or
21 perhaps it could come in to address issues of nondisclosure.

22 That is not how plaintiff is offering this exhibit at this
23 time. My understanding is they're offering it for the truth.
24 And we cited cases, including the *Murphy* case from 2010, this
25 district, that cited a settled law in this district that expert

1 reports are inadmissible hearsay when offered for the truth.
2 So we do --

3 **THE COURT:** That's fine. I understand. He can
4 testify -- we can go seriatim on this. We'll go question by
5 question this. I've made it pretty obvious, my ruling, in
6 terms of -- under 805 for hearsay within hearsay. We're all
7 cognizant of it, and we'll move accordingly. So it's
8 overruled.

9 You may continue, Mr. Connolly.

10 **MR. CONNOLLY:** Your Honor, at this point we're about
11 to transition from his background to the opinions that he
12 reached. It might be a good stopping point for a break, if
13 that works for you.

14 **THE COURT:** No, we don't need to -- we'll stop --
15 we'll go another 15 or 20 minutes, and we'll break for lunch.

16 **MR. CONNOLLY:** Sure. That's perfectly fine.

17 **THE COURT:** Ronda, you good for another 20 minutes?

18 We'll go around 20 after 12:00 -- well, 20 after 1:00. We
19 reconvened at 20 after 12:00. We'll go to 20 after 1:00; then
20 we'll break for an hour for lunch.

21 But you may continue.

22 **MR. CONNOLLY:** That works for us.

23 **BY MR. CONNOLLY:**

24 **Q.** General Walker, are you aware of the justifications that
25 the Naval Academy has used for using race in the admissions

1 process?

2 A. Oh, yes. Yes.

3 Q. I'd like to show you a page from the defendants' proposed
4 findings of fact and conclusions of law. This is from page 8.

5 They write, "In particular, as detailed below, the
6 military has made the judgment that diversity in the officer
7 corps fosters cohesion and lethality, aids in recruitment of
8 top talent and increases retention, and bolsters its legitimacy
9 in the eyes of the nation and the world."

10 In your opinion, is racial diversity necessary for
11 achieving any of these goals?

12 **THE COURT:** To the extent that there's an objection,
13 in terms of world opinion, this witness is not qualified. None
14 of these military witnesses are qualified to come in and
15 testify about foreign relations. Okay? So we'll make clear on
16 that.

17 To the extent he's testifying -- any of these witnesses
18 testify as to military readiness, preparedness, in his own
19 views, he can certainly answer that question. But it's so
20 limited. He's not an expert on foreign affairs, and I've not
21 seen anything from either side that qualifies any of the
22 military experts to opine on foreign affairs.

23 So if you rephrase your question, that'll be fine.

24 **BY MR. CONNOLLY:**

25 Q. I'll go through these one by one.

1 Are you -- the military has made -- do you believe that
2 racial diversity furthers or is necessary to achieve unit
3 cohesion?

4 A. No.

5 Q. Do you believe that racial diversity is necessary to
6 achieve lethality?

7 A. No.

8 Q. Do you believe that racial diversity is necessary to
9 achieve -- for the military to succeed with recruitment?

10 A. No.

11 Q. Do you believe that racial diversity is necessary for the
12 military to retain individuals?

13 A. No.

14 Q. And I'll see if I can phrase this another way, but do you
15 believe that racial diversity matters to the legitimacy -- in
16 your experience, do you believe that racial diversity matters
17 to how legitimate the military is?

18 **MR. ROBINSON:** Objection.

19 **THE COURT:** Sustained.

20 It's very simple. What you have on the screen here,
21 Mr. Connolly, is -- in particular is the detail below -- these
22 are the -- page 8 apparently, the proposed findings of fact and
23 conclusions of law -- findings of fact, rather, by the defense.

24 And it reads, "In particular, as detailed below, the
25 military has made the judgment that diversity in the officer

1 corps (1) fosters cohesion and lethality" -- if I'm pronouncing
2 that correctly. And he's opined as to and a witness on that,
3 and he can. He's opined in terms of his view that it does not
4 aid in recruitment of top talent and increases retention. And
5 he's been able to embellish on that, and he certainly can. And
6 he's qualified to testify as an expert.

7 In terms of bolstering its legitimacy in the eyes of the
8 nation and the world, we're getting into the foreign affairs.
9 And there's not one thing I've seen from any of the military
10 officers on both sides, going through extensive documentation,
11 that qualifies any of these people to come in and give their
12 views on foreign affairs.

13 And so to that extent, that's an inappropriate question.
14 It'll be stricken. And it has no effect upon me, upon his
15 view, or any other military officers on their own opinion of
16 foreign affairs.

17 **MR. CONNOLLY:** Understand, Your Honor.

18 **THE COURT:** And that is clear from the record, and
19 it's clear as to all these military experts.

20 I have a great deal of respect, General Walker, for your
21 experience, and I thank you for your service to the country.
22 And you'll be treated the same as any other officers, current
23 or retired. You're all clearly qualified to testify on these
24 matters. One of you have been qualified in the papers
25 presented to this Court that they're qualified to come in and

1 opine as to foreign affairs or views of the world.

2 **MR. CONNOLLY:** Understood.

3 **BY MR. CONNOLLY:**

4 Q. General Walker, I'd like to start with lethality.

5 A. Okay.

6 Q. Broadly speaking, what is the purpose of the United States
7 military?

8 A. To win our nation's wars.

9 Q. In your opinion, what are the keys to winning wars?

10 A. Training, resources, and leadership.

11 Q. I'd like to start with training. Why is it important for
12 the military to have servicemen who are skilled at their jobs?

13 A. Oh, especially -- especially in the combat arms, it's a
14 life-or-death situation when we're in battle. And if you have
15 someone on the team who is not doing their job properly, death
16 occurs, death of our people occurs.

17 Now, let's go to the other side, maybe the support field,
18 let's say even admin. Everything is important. If that person
19 is not skilled at his or her job in the admin field, it could
20 affect a soldier or sailor or airman's pay, and then you'll
21 have a family member signaling or calling to that deployed
22 person, saying, Oh, we don't have any money in the bank. And
23 then that service member will not be able to concentrate on
24 war. So that could affect things as well.

25 So everybody has a role, even cooks, that affects morale.

1 So everybody has to be skilled at their job.

2 Q. Why is it important for the military to have sufficient
3 resources?

4 A. Well, I don't really care how fierce a warrior you are, if
5 you don't go in with enough bullets, personal protective
6 equipment, fuel, et cetera, then you're going to lose.

7 Q. And to your third point, why is it important to have good
8 leaders in the military?

9 A. Well, leadership, I think, is actually the most important,
10 especially in combat. You can have so-called leaders who
11 coerce their troops to fight, and then you have real leaders
12 who inspire their troops to fight.

13 The ones who coerce their troops to fight and the troops
14 feel that they have to do it so that they can keep their job or
15 not get in trouble, we saw what happened in Vietnam when troops
16 were fragging their officers either with grenades or shooting
17 them. That doesn't happen nowadays because -- but the
18 leadership, when you inspire the troops, then they're going to
19 charge that hill with you.

20 If you say, "Hey, I will not do -- I will do anything that
21 I ask you to do and I will not ask you to do anything that I
22 won't do," they're going to follow you. And that is the best
23 way to leadership.

24 Q. Can you give me an example of a mission from your career
25 where all three of these factors -- training, resources, and

1 leadership -- were present?

2 A. Oh, yes, yes, yes. The initial days of flying into
3 Afghanistan, yes, yes.

4 Q. What was the situation that you were facing going into
5 Afghanistan?

6 A. When we were doing the initial missions -- and there were
7 many airfields that were blacked out, meaning that they had no
8 lighting whatsoever -- we -- in the initial flying into
9 Afghanistan, all of our missions were at night because, if we
10 owned the night, then the Taliban wouldn't even be able to see
11 us. They could hear us, but they wouldn't be able to see us.
12 And that would enhance our survivability.

13 But the problem is some of these airfields that have no
14 lights, we would have to use night vision goggles, our radar,
15 and very good crew coordination to actually land on these
16 airfields and hope that we actually landed on the airfield and
17 didn't crash into something.

18 Q. How did your squadron train for this mission?

19 A. Yeah. So our wing commander, Colonel Jesse Thomas, he
20 relentlessly had us practicing what they call these airborne
21 radar approaches into a dark field. We would have the airfield
22 manager in the tower shut off all the lights at our training
23 base, and we would practice landing using all of our equipment
24 and night vision goggles in the dark.

25 And so we did it over and over again to the point where a

1 lot of folks were going, "What? He's hazing us." But they
2 didn't realize -- the younger folks didn't realize what he was
3 doing was training us to win and survive.

4 Q. When you were flying these dangerous missions, did the
5 race of those around you matter?

6 A. No, not one bit.

7 Q. In your opinion, are there certain types of diversity that
8 can help a unit be more effective or lethal?

9 A. Oh, yeah. Oh, yes. Yeah.

10 Q. Can cultural diversity, such as knowing a language of a
11 foreign country, can that provide any benefits?

12 A. Oh, yes, most definitely.

13 Q. How can that provide benefits to the military?

14 A. Well, knowing the culture, especially when we're operating
15 with our partner nations, it actually smooths things when we're
16 coordinating with the senior officers and even midlevel
17 officers if we have somebody -- first of all, culturally, I'll
18 tell you this: Before we get deployed to any country for war
19 conditions, right now, the DoD does try to do extensive
20 cultural training; so that helps smooth it. But if you have
21 people on your team who grew up in that culture and know the
22 language pretty well, that helps it even more.

23 Q. Can you recall any time in your career when the person on
24 your squadron knew the language and culture of your host
25 country?

1 A. Oh, yes. When I was stationed at Yokota Air Base in
2 Japan, one of our pilots -- he was captain at the time -- Mark
3 Leavitt, he's a Latter-Day Saint, and he had done his mission
4 in Japan. And he was extraordinarily fluent in Japanese. And
5 that helped a lot when we were doing any exercises with the
6 Japanese air self-defense force.

7 Q. And what was the race of this person who knew Japanese?

8 A. White.

9 Q. When you were in Japan, were you aware of anyone on your
10 base who learned Japanese?

11 A. A lot of us were trying, even me. But there was one pilot
12 in another squadron, Dylan Monaghan. Holy smokes. At first he
13 dabbled in it because of his girlfriend, but then he decided to
14 get really serious about it. And he actually paid a Japanese
15 teacher to really teach him -- kind of like a sensei, to teach
16 him Japanese. And he got extremely fluent, so much so that he
17 was the first United States Air Force exchange officer with the
18 Japanese air self-defense force as a C130 instructor pilot.

19 Q. And this individual you just talked about, what was his
20 race?

21 A. Black.

22 Q. I'd like to focus on racial diversity specifically.

23 A. Okay.

24 Q. Do you think that racial diversity helps make a unit more
25 lethal or effective?

1 A. No.

2 Q. Why not?

3 A. Well, okay. So let's say -- you can't tell anything by
4 someone's skin color. Let's say that whole jury area was
5 filled with Black people. There's nobody in this court or in
6 this world who could point to any of them and tell me what
7 traits they have, what strengths they have, what ideas they
8 have, or how they think. Anybody attempting to do that would
9 only be stereotyping.

10 Q. In your 40-year military career, and in your opinion, do
11 all Black service members have similar viewpoints or similar
12 experiences?

13 A. I'll tell you, when I entered the Air Force, when I went
14 to the prep school and the Academy, I was naive enough to
15 believe that. But then I met -- and I'm a Black guy from New
16 York City. And then I met Black people from Mississippi,
17 California, Texas, Oregon, Colorado. And I found, holy smokes,
18 we don't think alike. Some of us like the same music; some of
19 us don't. A lot of stereotypes went out the window for me.
20 And I was indoctrinated with stereotypes coming up in New York
21 City.

22 Q. In your experience, do all White service members have
23 similar viewpoints or similar experiences?

24 A. Of course not. You get a White person from Boston and a
25 White person from Lafayette, Louisiana, and a White person from

1 Brownsville, Texas, they have much different experiences
2 growing up. A guy may be a farmer in Nebraska, much, much
3 different experiences and probably points of view.

4 Q. In your experience, is a unit more effective abroad when
5 it has Americans who look like the people living in the
6 country?

7 A. No.

8 Q. I want to direct you to something that Dr. Haynie wrote in
9 her declaration.

10 She writes, "Diversity can support enhanced cooperation,
11 trust, and understanding of the operational environment
12 overseas. As one example of where diversity has proven
13 benefits, a U.S. Army captain who was born in Haiti deployed to
14 Haiti 2021 to assist in postearthquake relief efforts. His
15 language proficiency and cultural awareness facilitated
16 coordination with Haitian partners."

17 Do you know who this person is who Dr. Haynie is referring
18 to?

19 A. I have no idea.

20 Q. But based on her descriptions, do you believe, and in your
21 experience, that this person's background could have helped our
22 efforts in Haiti?

23 MR. ROBINSON: Objection. Calls for speculation.

24 THE COURT: Overruled.

25 THE WITNESS: It most certainly helped, but we have no

1 idea whether this Army captain was Black or White. He was
2 probably Black, but the Court may know that there are White
3 people in Haiti. Matter of fact, there's a big enclave of
4 folks who made it through the Haitian revolution and the
5 Haitian massacre of 1804, and they live in Port-au-Prince, I
6 think in Pétion-Ville is the enclave. So there are White
7 Haitians too.

8 So this particular statement, she can't be talking about
9 racial diversity. All she's talking about is cultural
10 awareness and language proficiency.

11 **BY MR. CONNOLLY:**

12 Q. And, similarly, do you think that this person's race might
13 have helped our efforts in Haiti?

14 A. Don't think so. Look, if I were to go down to Haiti
15 and -- my French is cursory. But even if my French was fluent,
16 it would mean nothing because Haitian Creole is totally
17 different from French. If I went down to Haiti just because of
18 the color of my skin, I'd be lost in the forest.

19 Q. When you were stationed in Africa, did you find that your
20 race helped you to be more effective in your missions?

21 A. No. I was just another American.

22 Q. In your experience, are Africans more likely to act more
23 favorably to Black Americans than White Americans?

24 **MR. ROBINSON:** Objection. Lack of the foundation.

25 **THE COURT:** Sustained. Sustained.

1 BY MR. CONNOLLY:

2 Q. Can you recall any moment in your military career when a
3 person's race made your unit more effective?

4 A. No.

5 Q. Can you recall any moment in your career when leaders were
6 trying to balance a unit by race in order to make the unit more
7 lethal?

8 A. No. Never seen that, never heard of that.

9 Q. If having a racially diverse unit made a unit more lethal,
10 do you think you would have seen an effort to ensure racial
11 diversity among units?

12 A. Well, absolutely, yeah.

13 Q. How come?

14 A. Again, I'm using this term "worth his salt," but any
15 military worth his or her salt is looking for an edge to win.
16 And if that positively affected our winning, they would be
17 doing it.

18 MR. CONNOLLY: Your Honor, I'm about to turn to unit
19 cohesion.

20 THE COURT: That's fine. This might be an appropriate
21 place to stop. It's 20 after 1:00. We'll stop now for lunch
22 for an hour, and we'll start again at 20 minutes after 2:00.
23 This court stand in recess.

24 (A recess was taken from 1:18 p.m. to 2:25 p.m.)

25 THE COURT: Good afternoon, everyone. You all may be

1 seated.

2 General Walker, you're still under oath, obviously, sir.

3 Counsel, by the way, I meant to mention, in terms of lunch
4 in terms of access for sandwiches or whatever, there's a
5 conference room here on the third floor. I'm not sure if
6 anyone has said. I'm sure, Jakiba, someone can probably take
7 that over for the week or two. Or you can share it.
8 Obviously, I wouldn't suggest you all try to share it together,
9 although that might be useful.

10 But you have that. And then you can coordinate in other
11 ways. We'll talk to you maybe at the end of the day. Things
12 have come back enough so that there's a local pizza place
13 that'll deliver. So if you just think of that in terms of -- I
14 know an hour in the middle of a trial is not a whole lot of
15 time to go get lunch and move on.

16 But I meant to mention -- but there's one entire
17 conference room that's dedicated by some of the law firms in
18 the city, including my old firm, where we have a conference
19 room on the third floor. And there's computer access and what
20 have you. So I'm not sure how we apportion that, but you-all
21 can talk about that later at the end of the day. So I meant to
22 mention it. I apologize to you.

23 With that, I think we're ready to continue, Mr. Connolly,
24 with General Walker.

25 **MR. CONNOLLY:** Thank you.

1 **BY MR. CONNOLLY:**

2 Q. General Walker, before we get back into unit cohesion, at
3 one point in your testimony this morning, you referred to
4 yourself as Mookie. What are you referring to?

5 A. That's my Air Force call sign.

6 **THE COURT:** I'm sorry. What was the answer?

7 **THE WITNESS:** Mookie.

8 **THE COURT:** And that is your what call sign?

9 **THE WITNESS:** Air Force call sign.

10 **THE COURT:** Okay. All right. If we hear it broadcast
11 here in the courtroom, we'll all head for cover.

12 (Laughter.)

13 Go right ahead, Mr. Connolly

14 **BY MR. CONNOLLY:**

15 Q. How did you get that nickname?

16 A. I allegedly smiled like Mookie Wilson of the New York
17 Mets -- then New York Mets. And, of course, I fought against
18 that. I said, no, I don't. And the more you fight against a
19 call sign, the more it sticks. So for 40 years, I was Mookie.
20 If I hadn't fought it, I'd be Christopher today.

21 **THE COURT:** We'll refer to him as General Walker here.

22 (Laughter.)

23 **MR. CONNOLLY:** That is correct. That is definitely
24 true.

25 **BY MR. CONNOLLY:**

1 Q. Turning to unit cohesion.

2 A. Yes.

3 Q. In your experience, how does a group attain unit cohesion?

4 A. By the tried-and-true crucible, meaning hard training,
5 hard, advanced training, war, and realistic exercises because,
6 once they go through that together, they are -- they form a
7 fraternity or a sorority, but it becomes fraternal.

8 Q. How does the military try to achieve unit cohesion?

9 A. To give an example, basic training. They make basic
10 training hard. They bring in folks. They shave their heads.
11 They'll put them in a uniform, and they will tell them how to
12 wear that uniform properly. And if they don't, then they will
13 hear it pretty sternly. And that's saying it mildly,
14 especially for the Marine Corps.

15 And they will have them do hard runs, training, realistic
16 training on how to fight, how to shoot. And even some of the
17 runs, what you'll see is some people falling out, but they're
18 encouraged to grab their boot camp element or squadron mate and
19 help that person get across the line. So this is the kind of
20 thing that brings people together.

21 Q. In your experience, what type of people do service members
22 want to be around when they're heading into combat?

23 A. They want to be around people who know what they're doing
24 and know what they're doing very well. They want to be around
25 competent people.

1 Q. Why do service members care so much about competence?

2 A. Because they don't want to die. There are obviously a lot
3 of folks within all of the militaries, anybody who's come up in
4 the military, in any unit they're in, just about everyone knows
5 who the top performers are and who the bottom performers are.
6 And most of the time you don't want to be paired with the
7 bottom performers, especially if you're going into combat.

8 Q. Can you give me an example from your career when airmen
9 who are heading into combat cared about competence?

10 A. Okay. So except for after 9/11, whenever we're going to
11 be deployed into an area where we knew we were going into
12 combat, we usually know six months ahead of time, thereabouts.
13 And you'll get folks in the squadron going to the scheduler
14 trying to cajole the scheduler to keep them on crews with the
15 top people and avoid being on crews with the scrubs.

16 Q. In your 40-year career, did you ever see any airmen trying
17 to be assigned to a crew for a combat mission because of the
18 race of the crew member?

19 A. No.

20 Q. In your career as a general, did you study military
21 history?

22 A. Any general who hasn't -- or any flag officer who hasn't
23 is making a big mistake. I don't know how they would have even
24 gotten to that level. But yes.

25 Q. Are you aware of any historical examples where issues of

1 competence were more important than issues of race?

2 A. Oh, yes, yes.

3 Q. And what would that example be?

4 A. Matter of fact, this example was actually during a time
5 when there was segregation in the military. And I don't know
6 if Your Honor has seen the show "Masters of the Air."

7 **THE COURT:** Yes, I've seen it all. You're talking
8 about the Tuskegee Airmen.

9 **THE WITNESS:** The Tuskegee Airmen.

10 **THE COURT:** Yes.

11 **THE WITNESS:** So even with Air Force service members,
12 the White ones who are bomber pilots and bomber crews, they
13 wouldn't normally want to be fighting alongside Black service
14 members. But they started noticing that usually when their
15 formation goes out, one-third of the planes or more don't come
16 back.

17 But they started noticing that certain missions, most of
18 the planes or all of the planes came back. And they go, "Wait
19 a minute. What's that?" And then they finally figured out it
20 was when the Tuskegee Airmen were doing the escort missions.
21 And so after that, those White bomber crews were requesting the
22 Red Tails because they wanted to live.

23 **BY MR. CONNOLLY:**

24 Q. In your experience, are service members more likely to
25 follow leaders who share their same race or ethnicity?

1 A. No. That's ridiculous. They're more likely to follow
2 good leaders, because there could be someone of their same race
3 or ethnicity who is a really bad leader, and they will not
4 follow that person.

5 Q. When you were leading service members into combat, what
6 race were most of the service members under your command?

7 A. Vast majority, White.

8 Q. Would they follow you into combat?

9 A. Look, I can introduce you to scores of people, even to
10 this day, even with me being retired, who will tell you that
11 they'd follow me to the ends of the earth and back. And
12 conversely, I have had about three different commanders of mine
13 who were White who I would follow to the end of the earth and
14 back.

15 Q. In your experience, are units more likely to be cohesive
16 when there is racial diversity in the unit?

17 A. No, no -- that -- no.

18 Q. Why not?

19 A. Again, cohesion comes from that unit training hard
20 together and getting out there and winning. That is what
21 brings people together. I'm telling you, during combat you'll
22 have -- in all the services, during combat they'll come home
23 and they'll have -- all of those unit members will have a
24 tighter relationship than they do with their own spouses.

25 Q. Have you read the statements from the defendants' experts

1 about incidents of racial unrest in our country's history?

2 A. Oh, yes, yes.

3 Q. During the Vietnam War era, how did the United States
4 military treat African Americans?

5 A. Better than World War II but still bad. Back then, you
6 had certain officers who were overtly and outwardly racist and
7 would throw racial slurs with no penalty. And so, yes, that
8 was rampant back then.

9 Q. During the 1970s when you were growing up, did you ever
10 experience racism?

11 A. Yes.

12 Q. Can you give us an example of racism that you experienced
13 growing up?

14 A. My friends and I would frequently all get together and
15 bike ride around Queens. But we'd get into certain areas of
16 Queens or if we'd go into Nassau County and Elmont and end up
17 in the wrong neighborhood, we would be violently chased out
18 with them going, "Get out of here, you N-words." And so woe be
19 to any of us who fell off the bike then.

20 Q. During your 40-year military career, did you ever
21 experience racism from your superiors?

22 A. Not once.

23 Q. Did anyone in the military ever use any racial slurs
24 against you?

25 A. No.

1 Q. Does today's military have any tolerance for racism?

2 A. Absolutely not.

3 Q. What would happen to any service member or officer these
4 days who did use a racial slur?

5 A. Okay. It would probably vary in sanctions. If you had an
6 E1 or an E2 doing it, they would probably get nonjudicial
7 punishment, Article 15, get some pay docked from them just to
8 kind of get their minds right.

9 But if it were a senior officer or a senior NCO, they're
10 supposed to know better. And their face would probably be on
11 the front page of The Military Times, and they would be
12 cashiered out.

13 Q. In the last 40 years, are you aware of any significant
14 racial violence or racial unrest in the military?

15 A. In the last 40 years? No.

16 Q. During this time period, has the demographics of the
17 officer corps ever mirrored the broader society?

18 A. It never has, ever.

19 Q. In the last 40 years during your military career, have
20 there been prominent incidents of racial unrest in the country
21 outside of the military?

22 A. Oh, yes. Oh, yes. Rodney King in the 1990s. And
23 everybody in here knows about 2020 after George Floyd's death.
24 We actually had cities on fire with the violence all around the
25 United States. And I've got to say, if any kind of incidents

1 were going to happen in the military, that's when they would
2 have happened.

3 Q. If the racial demographics of the officer corps is not the
4 same as society as a whole, do you think that will cause the
5 military to experience racial unrest like occurred in the
6 Vietnam era?

7 A. That's actually ridiculous. No.

8 Q. And why not?

9 A. Look, Vietnam era -- first of all, most service members
10 today in uniform, the vast majority weren't even born then.
11 That was a whole different time. That was just when the Civil
12 Rights Act of 1964 came into being, and the country was trying
13 to turn itself into the country we are today.

14 So trying to compare us now, 2024, with the Vietnam era,
15 that's -- anybody should laugh at that. That's ridiculous. We
16 are a much different military now. And as you can see, I told
17 you that if anybody did any kind of racial slurs, that's the
18 end of their career.

19 Q. During your career, was there ever a point where you were
20 part of a unit where there were only a few Black officers?

21 A. Each and every unit I've been in, yes.

22 Q. And in your experience, did this lack -- did the lack of
23 Black officers increase racial tensions within the unit?

24 A. Not one iota.

25 Q. I'd like to turn now to recruitment.

1 A. Okay.

2 Q. When you were in the military, did you ever help with
3 recruitment?

4 A. All the time. From second lieutenant all the way up to
5 brigadier general, yes.

6 Q. What are the types of things that you would do to help
7 with recruitment?

8 A. Well, my job, whenever I did that, was not to do what our
9 recruiters do and get enlistees; my job was to go to different
10 schools and inspire youth to become Air Force officers, mainly
11 to fly, but, really, whatever mission we had as long as they
12 wanted to become Air Force officers.

13 Q. Did you ever meet with young people who were interested in
14 joining the military?

15 A. Hundreds.

16 Q. And in your experience, why were young people interested
17 in joining the military?

18 A. All sorts of reasons. Maybe their dad, granddad, uncles
19 were in the military, or their mother is in the military, and
20 they want to emulate them. Some just want to be part of
21 something bigger than themselves. Some just wanted to serve
22 our country. Some needed money for college. Some wanted to
23 get some maturity before they decided what they really wanted
24 to do in life. All sorts of reasons.

25 Q. What do you think is the most effective way to convince

1 young people to join the military?

2 A. I've seen it over and over that inspiring them is the way
3 to do it.

4 Q. And in your experience, how would you go about inspiring
5 young people to join the military?

6 A. Okay. I think just about everybody in the court is old
7 enough to have seen "Top Gun." So when that came out,
8 recruitment in the Navy, as well as all the other services,
9 shot up. But -- so whenever I go to these schools to talk to
10 the kids, I would not go in my dress blues; I would go in my
11 flight suit. And I'd regale them with tales of flying all over
12 the world in dangerous missions or having good times in
13 countries that they never dreamed they'd go to. And that made
14 their eyes open up like saucers. And that's what inspired
15 them.

16 Q. In your experience, is having a racially diverse officer
17 corps necessary for recruiting top talent to the military?

18 MR. ROBINSON: Objection. Improper opinion.

19 May I be heard?

20 THE COURT: Yes. Certainly.

21 MR. ROBINSON: Your Honor qualified this witness as an
22 expert in military operations, tactical operations. He just
23 testified that he doesn't have experience recruiting enlistees.
24 So I think it would be improper from him to offer an opinion on
25 this issue.

1 **THE COURT:** Sustained.

2 You have to rephrase the question. You've asked him a
3 question about his opinion and you've established that he gives
4 speeches to young people to inspire them. But you need to lay
5 a bigger foundation, Mr. Connolly.

6 **MR. CONNOLLY:** Sure.

7 **BY MR. CONNOLLY:**

8 **Q.** In your experience, is having a racially diverse officer
9 corps -- does having a racially diverse officers corps, has it
10 helped you when you were in the field recruit talent to the
11 military?

12 **MR. ROBINSON:** Same objection.

13 **THE COURT:** Yeah.

14 I'll try to help you, Mr. Connolly.

15 General, in your experience in terms of recruitment, have
16 you dealt with studies on recruitment and percentages and
17 percentages of responses in your speeches and inspiring young
18 people?

19 **THE WITNESS:** No, Your Honor. What I've had is the
20 young people actually come to me and say, "Okay. How do I do
21 this?"

22 **THE COURT:** Okay. But have you worked in terms of
23 recruiting goals in terms -- when you were -- you were deputy
24 adjutant general of the West Virginia National Guard, you were
25 commanding officer of the Air National Guard.

1 **THE WITNESS:** Correct.

2 **THE COURT:** So I would assume that you have had some
3 dealings with recruitment numbers up or down and how things are
4 going on an annual basis in that position, have you not?

5 **THE WITNESS:** Oh, yes. Oh, yes. Yes, Your Honor.

6 **THE COURT:** Okay. And in doing that, have you looked
7 at recruiting numbers in terms of how many young people are or
8 are not enlisting either out of high school or out of college?

9 **THE WITNESS:** Yes, Your Honor.

10 **THE COURT:** You may proceed in that fashion,
11 Mr. Connolly.

12 **MR. CONNOLLY:** Thank you for the assistance.

13 **BY MR. CONNOLLY:**

14 Q. In your experience, was -- in your experience, did having
15 a racially diverse officer corps help the military recruit top
16 talent?

17 **MR. ROBINSON:** Same objection as to --

18 **THE COURT:** No, I think it's -- I've laid the
19 foundation for this, Mr. Robinson. Clearly, he has a basis for
20 it in terms of his speaking with young people and in terms of
21 what his experience has been about whether it did or didn't
22 have an affect. So that's the nature of the question
23 generally.

24 You may answer the question as I've rephrased it.

25 **THE WITNESS:** Your Honor, I've had kids of all races

1 coming up to me clamoring for information on how to be an
2 officer in the Air Force.

3 **THE COURT:** Well, the fundamental question is whether
4 or not you've had any basis with respect to any of those people
5 indicating that the racial diversity or lack of racial
6 diversity had any effect on their decision in that regard.

7 **THE WITNESS:** I've never heard any of them say that.

8 **THE COURT:** Okay.

9 **THE WITNESS:** Everyone --

10 **THE COURT:** You've never interacted with them in terms
11 of racial diversity and their views on racial diversity?

12 **THE WITNESS:** Never.

13 **THE COURT:** They've come up to you -- I'm sure there
14 are young African American boys who have been impressed by your
15 career to come up to you, but have they ever made a reference
16 to "Wow, I can see a Black officer can rise, and I want to do
17 the same"? You've never had those specific conversations?

18 **THE WITNESS:** I've never had those specific --

19 **THE COURT:** Objection sustained. Objection is
20 sustained as to that topic.

21 **MR. ROBINSON:** Motion to strike that testimony, then?

22 **THE COURT:** No, I'm not going to strike it; I'm just
23 not going to consider it. I mean, I don't need to strike it.
24 You're looking at a one-person jury here, Mr. Robinson. We
25 don't need to strike anything. The general has candidly given

1 me his response. And so that nature of it, he's not --
2 clearly, he's not been involved in much of that from that point
3 of view. And your objection is sustained in that regard.

4 You may continue, Mr. Connolly.

5 **BY MR. CONNOLLY:**

6 Q. I'd like to turn now to retention.

7 A. Okay.

8 Q. In your experience, have you ever worked or been around
9 service members who are considering leaving the military?

10 A. Oh, yes. As a matter of fact, especially as chief of
11 staff and commander of the West Virginia Air National Guard,
12 when people getting out -- especially the officers, I'd want to
13 talk to them and see why.

14 Q. In your experience, what are service members who are in
15 combat most concerned about when deciding whether to stay in
16 the military?

17 A. Whether they're going to come back to their family alive
18 or -- and with all of the limbs that they went in with.

19 Q. In your experience, what are service members more broadly
20 most concerned about when deciding whether to remain in the
21 military?

22 **MR. ROBINSON:** Objection. Lack of foundation.

23 **THE COURT:** Sustained.

24 Mr. Connolly, perhaps I can help you on this to move it
25 along a little bit.

1 General, in terms of dealing with retention, you've not
2 only dealt with retention in terms of on active duty -- line
3 active duty abroad, but I assume, in terms of your role as
4 the -- just so the record is clear, you're the deputy adjutant
5 general of the entire West Virginia National Guard, Army, and
6 Air Guard combined, correct?

7 **THE WITNESS:** Well, I was the commander of the Air
8 Guard, and then we had --

9 **THE COURT:** But I understand you were deputy adjutant
10 general for the entire West Virginia Guard.

11 **THE WITNESS:** West Virginia Guard, yes.

12 **THE COURT:** All right. So in that capacity, you dealt
13 with both the Army Guard and the Air Guard?

14 **THE WITNESS:** Yes.

15 **THE COURT:** And then you were the commanding officer
16 of the Air National Guard?

17 **THE WITNESS:** Correct.

18 **THE COURT:** And so on that matter similarly in terms
19 of recruitment, you would have dealt with retention figures up
20 or down in terms of retaining officers or not retaining
21 officers. Okay?

22 **THE WITNESS:** Oh, yes. Yes.

23 **THE COURT:** And in that regard, have you ever dealt
24 with specifically -- well, the question related to officers.
25 With respect to officers who did or did not want to stay with

1 the Guard based upon racial diversity or lack thereof?

2 **THE WITNESS:** No. It was never on racial diversity;
3 it was only about family matters.

4 **THE COURT:** You've never had anyone indicate to you
5 that they didn't want to stay in the Guard because there
6 weren't sufficient diversity with the corps or that there was
7 too much diversity? You've heard had to deal with that
8 specifically in terms of the issue of retention?

9 **THE WITNESS:** Correct. That's correct, Your Honor.

10 **THE COURT:** The objection is sustained as to that
11 phrasing of the question. Thank you.

12 **BY MR. CONNOLLY:**

13 **Q.** General Walker, did you have any mentors when you were in
14 the military?

15 **A.** As a general -- I'm sorry. That was not a pun. As a
16 broad term, mentors, I've had mentors from superior officers
17 down to teenagers. It all just depends on what was happening.

18 But if you're talking about a mentor, any mentors who
19 positively affected my career so that I would be able to make
20 general, I would say maybe three.

21 **Q.** And of those three mentors, what was their race?

22 **A.** White.

23 **Q.** How many people have you mentored in your career?

24 **A.** Hundreds.

25 **Q.** For your mentees, have they -- have you ever talked to

1 them about what was important for the military -- whether they
2 would like to remain in the military?

3 A. Oh, yes.

4 Q. And have they ever talked to you about the importance --
5 did they ever tell you about why your mentorship was important
6 to them?

7 A. Well, a lot of them were trying to make the decision to
8 see where their career was going, and I was trying to guide a
9 lot of them to get the proper professional military education,
10 to get out of the cockpit and get into a staff position and get
11 different kinds of experiences.

12 But most of the time they were really worried about just
13 how much time they could spend with their family because we
14 were gone a lot. And that really put a lot of pressure on
15 families staying together. So that was a big concern for them.

16 And what I would do is, if I could, try to get those who
17 were thinking about it because they were away from their
18 families too long, trying to get them a staff position where
19 they would not be deployed for at least a few years.

20 MR. CONNOLLY: Your Honor, my next slide was to talk
21 about legitimacy. And based on your prior rulings, may I
22 ask --

23 THE COURT: Legitimacy in terms of world posturing?
24 I'm not sure -- what do you mean by "legitimacy"?

25 MR. CONNOLLY: What I was going to speak about is

1 legitimacy at home rather than legitimacy abroad.

2 **THE COURT:** Go ahead. Perhaps -- you might want to
3 try to follow my guideline on that. It might be helpful. But
4 whatever you want to do, go right ahead.

5 **MR. CONNOLLY:** Sure.

6 **BY MR. CONNOLLY:**

7 **Q.** General Walker, in your experience, when is the military
8 seen as being legitimate at home?

9 **MR. ROBINSON:** Objection. Improper opinion.

10 **THE COURT:** Sustained.

11 **BY MR. CONNOLLY:**

12 **Q.** General, in your experience -- I already asked that.

13 I'll move on to another section.

14 **THE COURT:** All right.

15 **BY MR. CONNOLLY:**

16 **Q.** I'd like to talk next about the so-called military
17 judgment about racial diversity that we've heard about. I'd
18 like to turn to a declaration from Ms. Truesdale on page 9.

19 And she writes, "The diversity of the Navy and Marine
20 Corps force is one of our greatest strengths. The Department
21 of Defense and the Department of the Navy have made a military
22 judgment that a racially diverse officer corps is necessary for
23 mission execution and maritime dominance, recruitment and
24 retention, and the Navy's legitimacy in the United States and
25 abroad."

1 General Walker, did you review Ms. Truesdale's
2 declaration?

3 A. I did.

4 Q. In her declaration did she identify any studies that the
5 Department of Defense conducted in order to reach this military
6 judgment?

7 A. She did not.

8 Q. Did she identify any data that supported the Department of
9 Defense's conclusions?

10 A. No.

11 Q. When you were a senior advisor at the Office of Diversity
12 and Inclusion, how did you go about analyzing proposals dealing
13 with issues of diversity and inclusion?

14 A. Again, I was looking for the data so that we could --
15 because I'd know that it was going to be challenged somewhere
16 up the line. And if we had data to back it up, then it would
17 be easier to get whatever policy they wanted to do across.

18 Q. Do you recall earlier our discussion about your office's
19 investigation into height restrictions on planes and women in
20 the Air Force?

21 A. Correct, yes.

22 Q. Before making that decision, were any studies conducted?

23 A. Oh, yes. Many.

24 Q. And what type of studies were conducted?

25 A. We mostly pulled in people, mostly women, who did not meet

1 our height restrictions. And we brought them into different
2 aircraft and said, "Can you reach these controls? Can you push
3 these rudder pedals? In the back as a load master, can you
4 reach this static line?" And many of them could.

5 And said then there's no -- so after all of that data, we
6 said then our height restrictions were ridiculous.

7 Q. Have you ever seen in your 40-year career, and especially
8 in your position at the Office of Diversity and Inclusion, have
9 you ever seen any similar data or studies showing that racial
10 diversity affected unit performance in the operational setting?

11 MR. ROBINSON: Objection. Improper opinion. Lack of
12 foundation.

13 THE COURT: Overruled.

14 THE WITNESS: I never saw one. And believe me, I was
15 looking.

16 BY MR. CONNOLLY:

17 Q. When you were at the Office of Diversity and Inclusion,
18 did you ever review any studies about diversity in the
19 corporate setting?

20 A. Yes. They used that as a basis for some of their claims.

21 Q. In your experience, were studies about diversity in the
22 corporate setting relevant to the military?

23 A. I would say no. It's apples and oranges. In the
24 military, we have to get our troops to charge hills with
25 machine gun nests. We have to get our folks to fly into

1 airspace that is rife with antiaircraft artillery and
2 surface-to-air missiles. We have to get our sailors to sail
3 into a battle where missiles are going to be raining down on
4 them. I don't know of any corporate setting that has anything
5 even near that.

6 Q. In this case the Court will likely hear views from people
7 still in the military who disagree with you. Why should the
8 Court accept your views over the views of others who are still
9 in the military?

10 A. Well, first, just common sense. I don't know if anyone
11 really believes that racial balancing is going to help us beat
12 China or beat Russia.

13 And, secondly, through all of the declarations and
14 everything that I've read given by the defendants, it seemed to
15 me like everybody was just parroting what the department -- the
16 Secretary of the Navy was saying, who was parroting what the
17 Secretary of Defense was saying, who was parroting what the
18 MLDC was saying, who were parroting what Congressman James
19 Clyburn said. It's an ostinato of the same narrative.

20 And I did not see credible data that supported it. So I
21 would implore the Court, if they do show data, please look at
22 it carefully because, from what I saw, it doesn't prove their
23 point.

24 Q. When you became the assistant adjutant general and
25 commander of the West Virginia Air National Guard, had there

1 ever been an African American in that position?

2 A. No. I was the first.

3 Q. How did that make you feel?

4 A. Well, I was certainly glad to become the commander of the
5 West Virginia Air National Guard, but I was uncomfortable with
6 them trying to trumpet throughout all the media that I'm the
7 first African American because I figured, oh, Lord, that's
8 going to get some people wondering whether I really deserved
9 the job or whether -- or whether it was a political thing.

10 Q. How did you respond to your concerns?

11 A. Well, I made sure that I busted my butt to be the best
12 commander they ever had, to be their -- even down at the lowest
13 levels, talking to all of the troops, both wings. I
14 volunteered and got more training, even as a general, to make
15 me more qualified than any other general in the West Virginia
16 National Guard, both Army and Air, including dual-status
17 qualification and joint task force qualification.

18 And so I made sure that I was always active and -- even
19 deploying as a general to show that I didn't get put up there
20 politically.

21 Q. Would you ever want to receive a position because of your
22 race?

23 A. No.

24 Q. How come?

25 A. Okay. So let's say that you're my superior officer and

1 you come to me and say, "Hey, I'm going to give this to you
2 because you're a Black man." That would be condescending to
3 me. That would -- to me, that would seem like you don't think
4 that I can reach those -- the standards of everybody else. To
5 me, it would seem like you're actually patting me on the head
6 and I've become your ward and I come and go by your leave.

7 It would actually piss me --

8 Pardon, Your Honor.

9 It would actually make me mad.

10 Q. What would happen to your leadership ability if those you
11 commanded believed you were put in your position because of
12 your race?

13 A. It would totally destroy my leadership capability.

14 Q. How do you think the military should treat people when it
15 comes to the service academies or any other assignments?

16 A. Hold everyone to the same high standards and treat
17 everyone equally.

18 MR. CONNOLLY: No further questions.

19 THE COURT: Thank you very much, Mr. Connolly.

20 Cross-examination, Mr. Robinson?

21 MR. ROBINSON: Yes.

22 Before we begin with cross-examination, we would move to
23 strike three portions of General Walker's report. First, the
24 hearsay within hearsay, which I think Your Honor had already
25 ruled on.

1 **THE COURT:** Essentially, I'm not going to consider it
2 if it's hearsay within hearsay.

3 **MR. ROBINSON:** And then, second, the foreign affairs
4 issues that Your Honor already ruled on.

5 **THE COURT:** Yes. I've already ruled on that.

6 **MR. ROBINSON:** And then, third, any aspect of the
7 report that General Walker did not address during his direct
8 examination.

9 **THE COURT:** As to portions that he did not address
10 during his examination?

11 **MR. ROBINSON:** Yes.

12 **THE COURT:** And what is the basis of that?

13 **MR. ROBINSON:** Hearsay.

14 **THE COURT:** All right. In other words, anything --
15 it's his report. And if he didn't parrot it again on the
16 witness stand here, it should not be considered?

17 **MR. ROBINSON:** Yes.

18 **THE COURT:** I don't see what the basis of hearsay is
19 on that. He's the subject of cross-examination. You can
20 cross-examine him on any of that.

21 **MR. ROBINSON:** Very well.

22 **THE COURT:** There's no basis, Mr. Robinson, for me to
23 parse through and, unless someone parrots everything they've
24 said in a statement, it's suddenly within hearsay. Under the
25 800 series or 801, that's an incorrect objection.

It's not hearsay. It's a statement offered out of court for the truth of the matter asserted therein, and you clearly have an opportunity to cross-examine. If you don't cross-examine, then you've given that up. I'm not going to go get deep into that. That's not a valid hearsay objection.

6 So you win on the first two. The third, you lose on. And
7 if you don't cross-examine him on certain portions, it will
8 come in. I intend to consider every inch of his report based
9 upon how it's been presented. And you're free to cross-examine
10 him on it. You don't need to get into foreign affairs, and you
11 don't need to get into the other area, but you go right ahead.

12 | MR. ROBINSON: Thank you. We will do just that.

13 | THE COURT: That's fine.

CROSS-EXAMINATION

15 | BY MR. ROBINSON:

16 | Q. Good afternoon, General Walker.

17 A. Good afternoon, John. Good to see you again.

18 | Q. We met at your deposition. It's good to see you.

19 You served as a brigadier general in the United States Air
20 Force, correct?

21 | A. Correct.

22 | Q. And you are now retired?

23 | A. Correct.

24 Q. Thank you for your service.

25 I just want to make clear that you are not testifying

1 today on behalf of the United States Air Force, correct?

2 A. Certainly not.

3 Q. You are not testifying on behalf of the Department of
4 Defense?

5 A. That is correct.

6 Q. You are speaking today as a private citizen?

7 A. Yes.

8 Q. And as a private citizen, you believe that a racially and
9 ethnically diverse officer corps is irrelevant to military
10 effectiveness, correct?

11 A. Correct.

12 Q. But you agree with me that that is not the view of the
13 Department of Defense, correct?

14 A. Correct.

15 Q. You worked in the Department of Defense for a number of
16 years?

17 A. Correct.

18 Q. You left recently in October of 2023, correct?

19 A. Correct.

20 Q. In fact, you the worked at the Pentagon on diversity and
21 inclusion issues specifically, right?

22 A. Correct.

23 Q. You worked in the Air Force's Office of Diversity and
24 Inclusion, correct?

25 A. Correct.

1 Q. And you worked for the assistant secretary of the Air
2 Force for Manpower and Reserve Affairs specifically on
3 diversity and inclusion issues, right?

4 A. I worked for the director of the Office of Diversity and
5 Inclusion on the diversity and inclusion issues. When I --
6 when I was dual-hatted and working in SAF/MR, I wasn't really
7 dealing with diversity and inclusion. I was more working on
8 issues of -- personnel issues, just to improve quality of life
9 for the airmen in the active duty, reserves, and Guard.

10 Q. Understood. But in that first position that you referred
11 to at the Air Force's Office of Diversity and Inclusion, you
12 were there for three years; is that right?

13 A. I'd say more like two and a half. It was February 28 of
14 2021 to October 21st of 2023.

15 Q. So you know, then, that in the Department of Defense's
16 view, a racially and ethnically diverse officer corps is a
17 national security imperative?

18 A. In their view, yes.

19 MR. ROBINSON: Could we display Plaintiff's
20 Exhibit 270. If we can go to page 2 of that exhibit.

21 THE COURT: What exhibit? Defense Exhibit 270?

22 MR. ROBINSON: It's actually Plaintiff's 270. It's a
23 joint exhibit, and there are no objections to this exhibit.

24 THE COURT: That's fine.

25 BY MR. ROBINSON:

1 Q. So, General Walker, these are remarks prepared by
2 Secretary of Defense Lloyd Austin to the Senate Armed Services
3 Committee on April 7, 2022, correct?
4 A. Correct.

5 Q. And if we could turn to page 10 of this document and look
6 at exactly this paragraph. Here he says -- Secretary Austin
7 says, "Enhancing diversity, equity, inclusion, and
8 accessibility is fundamental to our strategy. Building a
9 talented workforce that reflects our nation improves our
10 ability to compete, deter, and win in today's increasingly
11 complex global security environment -- and doing so is a
12 national imperative."

13 That's what he said to the Senate Arms Services Committee,
14 correct?

15 **THE COURT:** National security imperative.

16 **MR. ROBINSON:** National security imperative.

17 **BY MR. ROBINSON:**

18 Q. Correct?

19 A. That is correct.

20 **MR. ROBINSON:** We'll move this into evidence at this
21 time, Your Honor.

22 **THE COURT:** It's already been -- under local 107.5,
23 all of these exhibits that have been agreed upon are already in
24 evidence, as we noted before we started opening statements
25 today.

1 **MR. ROBINSON:** Excellent. Thank you.

2 **BY MR. ROBINSON:**

3 Q. General Walker, the Air Force in which you served also
4 believes that it is important to increase the racial and ethnic
5 diversity of the officer corps, correct?

6 A. Correct.

7 Q. When you were serving in the Air Force, you worked on a
8 program called GO Inspire, correct?

9 A. Absolutely correct.

10 Q. GO Inspire, that stands for General Officer Inspire,
11 right?

12 A. Correct.

13 Q. And in this program, generals in the Air Force such as
14 yourself would go to high schools and junior high schools and
15 talk about the Air Force, right?

16 A. Correct.

17 Q. And you personally were in charge of recruiting general
18 officers for this program, right?

19 A. I was personally involved in recruiting officers from the
20 Air National Guard and reserve because I -- my Rolodex was a
21 lot bigger than the folks in the Pentagon on that issue.

22 Q. Understood. And the goal of this program that you
23 participated in was specifically to increase the racial and
24 ethnic diversity of the Air Force, correct?

25 A. Correct.

1 Q. But you disagree with the Air Force's judgment that it's
2 important to increase the racial diversity of the officer
3 corps, correct?

4 A. Correct.

5 Q. Now, General Walker, it's not just this administration
6 that has made the military judgment that a racially and
7 ethnically diversity officer corps is a national security
8 imperative, correct?

9 A. Correct.

10 Q. You were working in the Pentagon during the last
11 administration, right?

12 A. Correct.

13 Q. You know who Secretary Esper is?

14 A. I do.

15 Q. He was of Secretary of Defense?

16 A. Yes.

17 Q. You've been in the room with him, in fact, correct?

18 A. At least two occasions, yes.

19 Q. Let's take a look at Defense Exhibit 178. This is also
20 already in evidence. This is a transcript of a message that
21 Secretary Esper gave to the force on DoD diversity and
22 inclusiveness, correct?

23 A. Correct.

24 Q. Dated June 18, 2020?

25 A. Correct.

1 Q. In that first paragraph there he says, "Today, I want to
2 speak to all members of the department about a subject that is
3 timely, important, and absolutely essential to the morale,
4 cohesion, and readiness of the military -- ensuring that our
5 ranks reflect and are inclusive of the American people we have
6 sworn an oath to protect and defend."

7 That's what he said, right?

8 A. That's what he said.

9 MR. ROBINSON: If we could turn to page 2 of this
10 exhibit now and blow up the second paragraph. Exactly.

11 BY MR. ROBINSON:

12 Q. He said, "Our military has also reached this level of
13 excellence because we attract the best America has to offer:
14 young men and women across the land and beyond our shores who
15 not only love our country and share these values, but who also
16 represent a wide range of creeds, religions, races,
17 ethnicities, sexual orientations, and other attributes that not
18 only distinguish us as individuals but also make us stronger
19 when combined together."

20 That's what he said, right?

21 A. That is correct.

22 Q. If we could turn to page 3.

23 Here he says, "A diverse and inclusive DoD draws out and
24 builds upon the best in each of us. It builds esprit de corps,
25 forges teamwork, and brings out the best between us. In short,

1 it brings out the best in America."

2 Correct?

3 A. That is what he said, yes.

4 Q. And, General Walker, you disagree that racial and ethnic
5 diversity forges teamwork and brings out the best between us,
6 correct?

7 A. I disagree, correct.

8 Q. If we could go to the next paragraph, Secretary Esper
9 says, "Over the past" -- next paragraph.

10 We can also just go back to the page, if that's helpful or
11 easier. That's great.

12 See the next paragraph, the fourth full paragraph on the
13 page. Secretary Esper says here in his remarks to the force,
14 "Over the past week, I have had the opportunity to speak with
15 the senior civilian and military leadership, both officer and
16 enlisted, on the topic of racial diversity. We all agree that
17 it is time to lead once again on this issue as America's most
18 respected institution and a globally recognized leader when it
19 comes to building diverse, winning teams, and creating
20 opportunity for all."

21 That's what he said, right?

22 A. That is what he said, yes.

23 Q. But you disagree with it?

24 A. In this particular one when he says building diverse
25 winning teams, I don't think race has anything to do with it.

1 I think experiences and language skills, cultural skills,
2 strengths, those are the kind of diversity that causes winning
3 teams. But skin color really doesn't enter into it.

4 Q. You think building racially and ethnically diverse winning
5 teams and creating opportunity for all, you don't think it's
6 important for America to lead on that issue, correct?

7 A. I believe that, with good leadership, the diversity that
8 they seek racially will happen on its own.

9 Q. General Walker, you have no reason to doubt that Secretary
10 Esper meant what he was saying in this paragraph, right?

11 A. I could never get into his head; so I would have to assume
12 that he meant what he said.

13 Q. Is it your testimony that Secretary Esper was simply
14 parroting what others were telling him to say?

15 A. Yes.

16 Q. All right.

17 MR. ROBINSON: We can take this down. And bring up
18 Defense Exhibit 177, which I will represent is already in
19 evidence.

20 THE COURT: Thank you.

21 BY MR. ROBINSON:

22 Q. We can take a look at the second paragraph here. This
23 document, General Walker, is dated June 19th, 2020, correct?

24 A. Correct.

25 Q. Actually, if we go back to the first page.

1 So this is one day after the June 18, 2020, message that
2 we just saw, right?

3 A. Correct.

4 Q. All right. So on this first page here in the second
5 paragraph -- I'm sorry. Defense Exhibit 177.

6 In the second paragraph Secretary Esper says -- I'm sorry.
7 Go back to that paragraph.

8 Secretary Esper said -- this is the June 19th memo from
9 Secretary Esper issued one day after the June 18 remarks we
10 just looked at.

11 Secretary Esper said, "To ensure the morale, cohesion, and
12 readiness of the military, it is essential that our ranks
13 reflect and are inclusive of the American people we have sworn
14 to protect and defend."

15 Correct?

16 A. That is what is written there, yes.

17 Q. And then if we go to the next page where we were. So
18 here, if you look at the full page, there are a few bullets of
19 tasks that Secretary Esper tasked DoD with.

20 Actually, let me ask you first. Have you seen this memo
21 before?

22 A. Yes. This looks very familiar.

23 Q. You're very familiar with it.

24 So you know, then, that in this June 19, 2020, memo,
25 Secretary Esper directed that a diversity and inclusion board

1 be formed at DoD to look at these issues and to issue
2 recommended changes by June 29, 2020, correct?

3 A. Correct.

4 Q. All right. So let's take at the report that that DoD
5 board put together. This is Plaintiff's Exhibit 210.

6 Again, it's a joint exhibit that's already in evidence.

7 So this is that report that Secretary Esper directed,
8 correct?

9 A. Correct.

10 Q. And you're familiar with this report, right?

11 A. Oh, yes.

12 Q. Having worked on diversity inclusion issues at the
13 Department of Defense.

14 So if we can take a look at page 8. I'm going to read
15 from the bottom left of page 8 to the top right where it talks
16 about who served on this board at DoD.

17 And it says, "The 15-member board, led by the Secretary of
18 the Air Force, included the senior enlisted advisor to the
19 Chairman of the Joint Chiefs of Staff, the Undersecretary of
20 Defense for Personnel and Readiness, and service members from
21 each branch of the DoD military services and the National
22 Guard.

23 "Advisors to the board included representatives from the
24 DoD Office of Force Resiliency, DoD Office of the General
25 Counsel, DoD Office of the Chief Management Officer, Office of

1 the Assistant Secretary of Defense for Legislative Affairs, and
2 Office of the Assistant Secretary of Defense for Public
3 Affairs."

4 That's what it says, right?

5 A. That's what it says.

6 Q. So let's look at what this board of 15 officials as
7 described in this paragraph concluded after looking at these
8 issues.

9 If we could turn to page 6.

10 This is the Department of Defense Diversity, Equity, and
11 Inclusion Statement, correct?

12 A. Correct.

13 Q. And the last sentence of this statement says, "We believe
14 diversity is the key to innovation, inclusion is imperative for
15 cohesive teamwork, and equality is critical to total force
16 readiness."

17 That's what it says, right?

18 A. That is exactly what it says.

19 Q. And if we go to the next page, page 7. I'm going to look
20 at the first paragraph here and the last sentence. I'm just
21 going to read it.

22 It says, "Moreover, the Department of Defense recognizes
23 diversity and inclusion as strategic imperatives to ensure that
24 the military across all grades reflects and is inclusive of the
25 American people it has sworn to protect and defend."

1 That's what it says, right?

2 A. That's what it says.

3 Q. And if we could turn to page 21 now. I'm going to read
4 from the right-hand side the first full paragraph.

5 "Appropriate representation of minorities in military
6 leadership positions is increasingly important in the context
7 of the nation's demographic trends."

8 That's what they concluded, right?

9 A. That's what it says.

10 Q. And you, General Walker, disagree with all of that, right?

11 A. So the previous thing that you read with that -- with the
12 statement and that last thing, again, I want to say that my
13 definition of diversity, meaning various skill levels, language
14 skills, cultural skills, maybe STEM skills, maybe experiences
15 from living in Alaska or experiences from living in a tropical
16 climate, all of that diversity really comes together.

17 But, again, skin color, you cannot tell any attributes
18 like that.

19 Q. You understand, General Walker, that the Department of
20 Defense actually has a definition of diversity and inclusion,
21 right?

22 A. Yes.

23 Q. And you understand that DoD's definition of diversity
24 includes racial and ethnic diversity, right?

25 A. Correct.

1 Q. So when the Department of Defense in these official
2 documents says that diversity is important for the reasons it
3 says it is, they're referring not just to diversity under your
4 definition; they're referring to a definition that includes
5 both racial and ethnic diversity, right?

6 A. Correct.

7 Q. General Walker, even some of the military leaders that you
8 cited and relied on in your report believe that a racially and
9 ethnically diverse officer corps is a mission-critical national
10 security interest, right?

11 A. Some do, yeah.

12 Q. One individual who believes that is General Colin Powell,
13 right?

14 A. Maybe. I don't remember reading him saying about racial
15 diversity.

16 Q. Okay.

17 Let's put up Defense Exhibit 190. This is for
18 identification purposes only. This is a brief that was filed
19 in the Supreme Court of the United States in the *Fisher v.*
20 *Texas at Austin* case, correct?

21 A. Correct.

22 Q. Could we turn to page 2 of the brief. This is a list of
23 amicus that are signing onto this brief, correct?

24 A. Correct.

25 Q. Do you see General Colin Powell's name reflected on this

1 list?

2 A. Yes, I see it.

3 Q. And you see Admiral Mike Mullen's name on this list,
4 correct?

5 A. I do. I do.

6 Q. He was also a former chairman of the Joint Chiefs of
7 Staff?

8 A. Correct.

9 Q. Former admiral in the Navy?

10 A. Correct.

11 Q. Can we go back to the first page.

12 This lists General Ronald Fogelman. You're familiar with
13 General Fogelman, correct?

14 A. I am.

15 Q. You actually cite and rely on General Fogelman in your
16 expert report, correct?

17 A. Correct.

18 Q. He was a former -- what was his former position? He was
19 former chief of staff of the Air Force?

20 A. Chief of staff of the Air Force.

21 Q. Right. Okay. Can we turn to page 11.

22 And do you see that in this brief that those generals
23 signed onto, the first sentence under the summary of the
24 argument is "For the United States military, a highly qualified
25 and racially diverse officer corps is not a lofty ideal. It is

1 a mission-critical national security interest."

2 That's what it says, right?

3 A. That's what it says.

4 Q. If you look down on the same paragraph it says, "Based on
5 decades of experience, the modern United States military
6 regards a highly" --

7 And then if we could go to the next page. I believe it
8 will be page 12 of the brief.

9 So I'll just read from the preceding page and then read
10 the rest of it.

11 So the preceding page said, "Based on decades of
12 experience, the modern United States military regards a highly
13 qualified" -- and now it continues here -- "and racially and
14 ethnically diverse officer corps as vital to military
15 effectiveness."

16 You disagree with that statement, right?

17 A. I do.

18 Q. You disagree with the judgment of the senior officers who
19 signed this brief?

20 A. Correct.

21 Q. Including General Powell and including Admiral Mullen,
22 correct.

23 A. Correct. I don't have a halo effect with them. I'm
24 entitled to disagree. And that happens quite often within the
25 military. It's just that once the commander makes the

1 decision, then everybody has to be one voice.

2 Q. You're not suggesting that General Powell and Admiral
3 Mullen were signing this brief only because someone made a
4 decision they needed to follow this, right?

5 A. No. What I'm telling you is I can still disagree.

6 Q. Certainly.

7 We can take this down.

8 A. Yes.

9 Q. General Walker, you would agree with me that this country
10 has had a problem with racial prejudice, correct?

11 A. Yes.

12 Q. The military's problems with racial prejudice have been
13 well documented?

14 A. Yes, at least up into the Vietnam War. Nowadays, it's not
15 a problem.

16 Q. We'll get to that in a second.

17 You yourself as a Black man living in the United States,
18 you've testified on direct, you've been the victim of racial
19 discrimination yourself?

20 A. Yeah, back in -- when I was, like, 12, 13 years old, yeah.

21 Q. You actually agree there are -- that racial prejudice does
22 still exist in the military today, right?

23 A. Of course. Look, the military is a microcosm of society;
24 so it would be ridiculous for me to try and say that there are
25 no racists in the military.

1 Q. In fact, when you worked with the Department of Defense,
2 you worked with a report done by the Air Force, Office of
3 Inspector General, on racial disparities in the Air Force,
4 right?

5 A. Correct. Racial disparity review, RDR.

6 Q. Let's take a look at that review. This is Defense
7 Exhibit 192.

8 **MR. ROBINSON:** Again, can represent no objections to
9 this document.

10 **THE COURT:** That's fine.

11 **BY MR. ROBINSON:**

12 Q. So this is that report we were just talking about, right?

13 A. Correct.

14 Q. And you've spent a lot of time at the Pentagon with this
15 report, right?

16 A. That's right.

17 Q. And it says there that it was issued by the Inspector
18 General for the Department of the Air Force, right?

19 A. Correct.

20 Q. All right. Can we take a look at page 94.

21 So, in this report, it discusses various survey questions
22 that were sent to airmen in the Air Force, right?

23 A. Correct.

24 Q. And this particular survey question asked airmen if they
25 agreed or disagreed with the following statement: "I trust my

1 chain of command to address racism, bias, and unequal
2 opportunities regarding all enlisted officers and civilians."

3 That's what it says, right?

4 A. That's what it says, yes.

5 Q. And only 46 percent of Black enlisted airmen agreed with
6 that statement, right?

7 A. That's right.

8 Q. 40 percent of Black enlisted airmen disagreed with that
9 statement, right?

10 A. Right.

11 Q. And even 40 percent of Black officers disagreed with the
12 statement that they trusted their chain of command to address
13 racism, bias, and unequal opportunities regarding all enlisted
14 officers and civilians, right?

15 A. Right.

16 Q. General Walker, you think this is a problem, right?

17 A. Oh, that is a problem. But what we need to find out is
18 what is the root cause of that.

19 Q. Let's take a look at page 102. This is another survey
20 question that was asked of all airmen in the Air Force. And
21 the question was "Do you agree or disagree with the following?
22 I believe Black service members are less likely to receive the
23 benefit of the doubt in Air Force discipline."

24 Again, 59 percent of Black enlisted airmen agreed with the
25 statement that Black service members are less likely to receive

1 the benefit of the doubt, right?

2 A. That's what it says, yes.

3 Q. 64 percent of Black officers agreed that Black service
4 members were less likely to get the benefit of the doubt,
5 correct?

6 A. That's what it says, yes.

7 Q. Let's take a look at page 104 of this report. This is a
8 survey question that asks if airmen agreed or disagreed with
9 the following: "I have seen bias as it relates to career
10 development opportunities for enlisted, civilian, and officer
11 Black airmen and space professionals."

12 41 percent of Black enlisted airmen agreed that they had
13 seen such bias, correct?

14 A. Correct.

15 Q. And 64 percent of Black officers -- I'm sorry --
16 50 percent of Black officers said that they agreed that they
17 had seen such bias, correct?

18 A. Correct.

19 Q. Take a look at page 105. And this is a yes-or-no
20 question. And the question is "Have you ever been
21 discriminated against by a member of the Department of the Air
22 Force because of your race and ethnicity?"

23 50 percent of Black enlisted airmen said that they had,
24 correct?

25 A. Correct.

1 Q. 48 percent of Black officers said that had, correct?

2 A. Correct.

3 Q. All right.

4 You can take this down.

5 Now I want to talk about some of your views about
6 diversity generally, not specifically racial and ethnic
7 diversity, but just diversity generally.

8 So you mentioned on direct examination -- and I think on
9 cross as well -- that you have your own definition of diversity
10 that means varied backgrounds, socioeconomic circumstances,
11 languages, culture, skill sets, right?

12 A. Correct.

13 Q. But that doesn't include racial and ethnic diversity,
14 right?

15 A. You can't tell any of those attributes by skin color.

16 Q. But at least under your definition of diversity, you agree
17 that that kind of diversity can be a strategic asset, right?

18 A. Yes.

19 Q. And that's because, in different situations, you need
20 different points of view to get to a solution, right?

21 A. Correct.

22 Q. And some people with one background might approach a
23 problem differently than someone from a different background,
24 right?

25 A. That's correct.

1 Q. You believe that diversity, using your definition, has
2 benefited commanders in the field of combat, right?

3 A. Correct.

4 Q. And you believe that diversity has benefited in
5 humanitarian aid situations, right?

6 A. Correct.

7 Q. You believe that people from different backgrounds,
8 groups, regions, and cultures experience conflict differently,
9 right?

10 A. Correct.

11 Q. And you agree even that race can be one factor that could
12 affect someone's life experiences and viewpoints, right?

13 A. Anything could. A bee sting could affect someone's life
14 experiences, yes. So anything can.

15 Q. All right. Now I want to turn to some of your specific
16 opinions in this case about racial and ethnic diversity.

17 A. Okay.

18 Q. First, you believe that mission accomplishment does not
19 depend on a racially and ethnically diverse officer corps,
20 right?

21 A. Correct.

22 Q. You think racial and ethnic diversity are irrelevant to
23 unit cohesion, right?

24 A. I think good leadership and good training does unit
25 cohesion. What racial and ethnic does has nothing to do with

1 it.

2 Q. You cannot think of any reason why racial and ethnic
3 diversity could be helpful to any organization, including the
4 military?

5 A. Every situation is going to be different, but I'm telling
6 you it's leadership. Leadership, leadership, leadership.
7 Whether the commander is Black, whether the commander is White,
8 if it's a bad leader, then there's going to be no unit
9 cohesion.

10 Q. Just to be clear, you cannot think of any reason why
11 racial or ethnic diversity could be helpful to an organization,
12 right?

13 A. Helpful to what? A combat organization or what? You say
14 "an organization." That's broad. You could be talking about
15 Merrill Lynch. I don't know. What are you talking about?

16 Q. Is it your testimony that racial and ethnic diversity can
17 be helpful to business organizations?

18 A. Maybe. Can be. They claim it is.

19 Q. What's your opinion? Didn't you offer opinions on this on
20 direct?

21 A. Even in the corporate setting, if you have good
22 leadership, a good leader knows how to bring everybody
23 together.

24 Q. Yes or no? Is it your opinion that racial and ethnic
25 diversity can be helpful to organizations in the business

1 context?

2 A. It can.

3 Q. It can. But you think it doesn't apply to the military?

4 A. I think, again, with what you're talking about with unit
5 cohesion and lethality, it is irrelevant.

6 Q. Why do you think racial and ethnic diversity can be
7 helpful to a business organization?

8 A. Again, I said it can. But I -- someone would have to show
9 me exactly how, what -- what that particular racial component
10 of it did to make the organization better. And then I would
11 probably point to them and say, okay, if another person of that
12 color didn't have those skills, would it have done the same
13 thing?

14 So, again, it goes back to my -- my definition of
15 diversity. Skin color, you cannot tell any attributes from
16 skin color.

17 Q. All right. But let's go back to military organizations,
18 then.

19 In the context of military organizations, you think racial
20 and ethnic diversity are irrelevant to unit cohesion, for
21 example?

22 A. Correct.

23 Q. And your views about the lack of importance of diversity,
24 those apply to gender diversity as well, right?

25 A. I'll say this. With gender diversity, it has helped in

1 situations when we were in Afghanistan, knowing the culture out
2 there. If we had any of our soldiers -- male soldiers
3 searching women, it would have caused more hatred. So in the
4 interest of winning hearts and minds, it was a good idea to
5 have women who would search the women and let the men search
6 the men.

7 Q. Well, let's talk about the admissions context. You are
8 here today offering opinions about the Naval Academy's
9 admissions process.

10 You think that the Naval Academy should not give any sort
11 of preference for women in the admissions process, correct?

12 A. Even then, yeah, no preference. There are plenty of women
13 out there who are butt kickers and who could get in without
14 that.

15 Q. And you believe, for example, that if the Air Force
16 consisted only of men, the only problems that would arise would
17 be political, right?

18 A. Yes.

19 Q. Now, in forming this opinion that mission accomplishment
20 does not depend on a racial and ethnically diverse officer
21 corps, you did not conduct any studies yourself, correct?

22 A. Correct.

23 Q. You did not do any type of survey of service members,
24 correct?

25 A. Correct.

1 Q. You have not authored any publications on this issue,
2 correct?

3 A. Correct.

4 Q. In fact, you've never done any academic research on
5 diversity and inclusion, have you?

6 A. Correct.

7 Q. You are not a sociologist, correct?

8 A. Correct.

9 Q. You are not a political scientist, correct?

10 A. Correct.

11 Q. And do you believe that your opinions about the lack of
12 relevance of racial and ethnic diversity apply not only to the
13 Air Force in which you served but also to the Navy and Marine
14 Corps, right?

15 A. Correct.

16 Q. But you've never been stationed on a Navy ship, have you?

17 A. Well, many -- many joint commanders -- I'll tell you right
18 now, South Com commander General Laura Richardson probably
19 never been stationed on a Navy ship either, but she commands
20 Navy, Air Force, Army, and Marines. So that's irrelevant.

21 Q. But -- well, my question was, have you, General Walker --

22 A. Stationed on a ship? No.

23 Q. Never been deployed on a Navy ship?

24 A. Never been deployed on a Navy ship.

25 Q. For the last 20 years, you've been a member of the

1 National Guard, correct?

2 A. Correct.

3 Q. And the National Guard does not have a naval component,
4 correct?

5 A. That is correct.

6 Q. And you are a career officer in the --

7 THE COURT: Just to clarify, there is a Naval reserve
8 but not a Naval national guard.

9 THE WITNESS: National Guard.

10 MR. ROBINSON: Correct. Correct.

11 THE COURT: Actually, General Walker, there is a Naval
12 reserve, correct?

13 THE WITNESS: There is a Naval reserve, yes. Naval
14 reserves and Marine reserves, but the Guard only has Army and
15 Air Force.

16 BY MR. ROBINSON:

17 Q. So, General Walker, your opinion that racial and ethnic
18 diversity are irrelevant to unit cohesion, that is based
19 entirely on your personal experiences in your units and
20 watching other units perform?

21 A. Correct.

22 Q. But you would acknowledge that your experiences, your own
23 experiences, may not be representative of everyone in the
24 military, right?

25 A. That is correct.

1 Q. For example, General Walker, you have never yourself
2 witnessed an example of racial prejudice in your time in the
3 military, right?

4 A. Correct.

5 Q. But we know from those surveys that we were just looking
6 at that many airmen say that they have been discriminated
7 against by a member of the Air Force because of their race and
8 ethnicity, right?

9 A. Yes, that's what is said. And even then when we examined
10 it -- and I actually talked with certain airmen who claim
11 that -- when I really, really dig deep and ask them questions,
12 it turns out that, no, it wasn't really racial discrimination;
13 it's just that their commander was a butthole. And that's it.
14 It's a bad commander.

15 Q. We can go back to the report if it would be helpful. But
16 I think something like 50 percent of airmen said that they had
17 experienced discrimination.

18 A. Yes.

19 Q. Is it your testimony that all 50 percent of those airmen
20 who responded to that survey didn't really believe that they
21 had been discriminated against but their leader was just a
22 butthole?

23 A. No. What I'm saying is they believed it was racial
24 discrimination, but in many cases it was just a bad commander.

25 Q. And that's a problem, right?

1 A. A bad commander is always a problem, yes.

2 Q. The fact that 50 percent of airmen believe they've been
3 discriminated against, that's a problem, right?

4 A. Well, it's a problem that they perceive that, yes. It is
5 a problem, yes.

6 Q. You have also offered an opinion in your expert report --
7 I think you didn't address it as much on direct, but you
8 addressed it to some extent -- that if the Naval Academy stops
9 considering race in the admissions process, that will not harm
10 recruitment, right?

11 A. Correct.

12 Q. And this opinion, like your other opinions in this case,
13 is based solely on your personal experiences, right?

14 A. No. Actually, I've read that, the Boston Consulting Group
15 report that was shown earlier. And those enthusiastically
16 participating Naval Academy grads came with troves of data,
17 looked up U.S. Naval Academy archives, did personal interviews
18 and looked at open-source documents, and they came to that
19 conclusion too.

20 Q. Your testimony is that the Boston Consulting Group came to
21 the conclusion that a racially and ethnically diverse officer
22 corps will not help with recruitment?

23 A. No, no. They came to the conclusion of the last thing you
24 asked me, whether if -- if they -- if the Naval Academy stopped
25 using racial preferences, it would -- it would affect the

1 population of the -- the racial population of the Naval
2 Academy.

3 Q. So I think what you may be referring to -- and I think
4 this was addressed in the opening statements; I saw you were
5 here for them -- was a finding about the percentage --

6 A. Oh, yes, yes.

7 Q. -- of officers that are -- of Naval officers that come
8 from the Naval Academy, right?

9 A. That they would not be able to affect the population of
10 Naval officers to be able to bring it to a racial balancing or
11 racial proportion of the country. That's what it was, yes.

12 Q. Right. So the Boston Consulting Group didn't say anything
13 about --

14 A. They didn't say that, yeah. The Boston Consulting Group,
15 they just -- they just said, yeah, they couldn't affect that,
16 yeah.

17 Q. So this opinion about recruitment isn't, in fact, based on
18 the Boston Consulting Group study --

19 A. Yeah.

20 Q. -- it's just based on your personal experiences, right?

21 A. Correct.

22 Q. So in your view, instead of seeking to improve the racial
23 and ethnic diversity of the officer corps, you think the
24 military should follow what you call a professional athlete
25 model, right?

1 A. Yes.

2 Q. And what you mean by this is the NBA, the NFL, the MLB,
3 they go out into schools and show kids what they do. And the
4 idea is that will inspire them to get into the sport, right?

5 A. That is correct. And they do it very well.

6 Q. And you didn't come up with this idea yourself, right?

7 A. No. No. It was a retired naval officer Flack Maguire.
8 That's his call sign. I really don't even know what his real
9 first name is. But I met him years ago. And he talked to me
10 about it.

11 And I said you know what? That's the way to do things
12 because that -- that will get every corner of the United States
13 inspiring kids at a young age and getting them inspired at that
14 young age.

15 Once they're inspired, then you tell them what it takes to
16 get there and they will do it. And so we'll get -- this racial
17 diversity that the DoD seeks, it'll come naturally that way.

18 Q. So this gentleman, Flack Maguire, approached you about
19 this idea --

20 A. Yes.

21 Q. -- that the service academy should follow this
22 professional athlete model. This was in 2020, right?

23 A. 2020-ish, yes.

24 Q. This idea, this professional athlete model, is not based
25 on any research, right?

1 A. Well, actually, yes. So China is doing it. And we got --
2 we got reports out of China, and some were in Mandarin. We had
3 to get them translated. But it does show that they're doing
4 that. And that is getting their youth -- by the time their
5 youth are 22 years old, they are already Olympic-level pilots.

6 Whereas we in the United States Air Force, United States
7 Navy, and all of the other services, we wait stupidly until
8 they're 22 and then try to turn them into world-class pilots.
9 So it has -- so there is data.

10 Q. Well, is China doing this to increase the racial and
11 ethnic diversity of their officer corps?

12 A. No. They're doing it to increase their lethality. And
13 that's what we should be doing as well to increase our
14 lethality. What I'm telling you is that the diversity will
15 happen naturally that way.

16 Q. Okay. So the China reference point doesn't tell us
17 anything about whether this model will increase the racial and
18 ethnic diversity of the officer corps, right?

19 A. Well, in China when you have just about everybody being
20 Han Chinese, it's not going to do that.

21 Q. And so aside from this China study you referenced, there's
22 no other research that you looked at that supports this idea
23 that the professional athlete model would increase the racial
24 and ethnic diversity of the officer corps?

25 A. Just look at the results of what's happening in the NFL.

1 NFL, the players, vast majority -- over 60 percent of the
2 players are Black and most of the coaches are White. But that
3 doesn't keep them from joining.

4 Q. So you looked at the NFL results. But just to be clear,
5 you haven't looked at any, like, peer-reviewed literature
6 showing that this approach would increase the racial and ethnic
7 diversity of the officer corps, right?

8 A. Correct.

9 Q. You were just sold on it immediately after Mr. Maguire
10 introduced you to it, right?

11 A. No, after I looked at some of the data he had. And I
12 said, "Okay, Flack. This has legs."

13 Q. You were sold on it immediately, right?

14 A. Almost immediately.

15 Q. All right. You also offer some opinions in this case
16 about why you believe the Naval Academy's consideration of race
17 can actually be harmful to the military, right?

18 A. Yes.

19 Q. But just to be clear, you've never served on a Naval
20 Academy admissions board, right?

21 A. Correct.

22 Q. You've never been a reader of Naval Academy applications
23 for admissions, right?

24 A. Actually, yes, I have, but not -- but not as a board --
25 not as an admissions board member, but for some of my mentees

1 who are putting in their applications and I helped them to
2 bolster them, yes.

3 Q. All right. So in that context, but no official context
4 for the military did you review or consider applications,
5 right?

6 A. Correct.

7 Q. And your understanding of how the Naval Academy uses race
8 in the admissions process is that they use racial preferences
9 to give additional points and will also accept lower SAT scores
10 for certain minorities.

11 That's your understanding, right?

12 A. That was my understanding, yes.

13 Q. You're not aware of any other way in which the Naval
14 Academy uses race in the admissions process, correct?

15 A. All of the methods that Josh mentioned this morning; so...

16 Q. But the first time you became aware of that was this
17 morning when Mr. Gardner presented them?

18 A. Some of those other things, yes.

19 Q. So when you wrote your report about what you think the
20 harms will be flowing from the Academy's consideration of race,
21 you weren't aware of those aspects of the process, right?

22 A. Correct.

23 Q. And you don't know whether the Naval Academy uses race to
24 determine whether an applicant is qualified or not qualified,
25 right?

1 A. That's correct.

2 Q. You're not familiar with the concept of the whole-person
3 multiple, right?

4 A. Actually, I am. Because the Air Force Academy does that
5 sort of thing as well, and West Point.

6 Q. Well -- so are you thinking of the whole-person concept
7 where you evaluate the whole person --

8 A. The whole-person multiple concept, yes. But the multiple,
9 I learned about it by reading some of the filings.

10 Q. That was after your deposition in this case?

11 A. Correct.

12 Q. So at the time of your deposition, you were not aware of
13 the concept of the whole-person multiple, right?

14 A. Correct.

15 Q. When you wrote your report, you were not aware of the
16 concept of the whole-person multiple, right?

17 A. Correct.

18 Q. And you don't know, then, or you didn't know at least, at
19 the time of your deposition, whether the whole-person multiple
20 considered an applicant's race, right?

21 A. Correct.

22 Q. And that's because you hadn't studied the Naval Academy's
23 admissions process by that time, right?

24 A. Correct.

25 Q. Now, General Walker, you are a member of a group called

1 STARRS. I think you mentioned them on direct examination?

2 A. Correct.

3 Q. That stands for Stand Together Against Racism and
4 Radicalism in the Services, correct?

5 A. Correct.

6 Q. And part of STARRS' mission is actually to end affirmative
7 action at the service academies, right?

8 A. That is one of the things we're concerned about, yes.

9 Q. You believe that affirmative action is a form of racism,
10 right?

11 A. Yes.

12 Q. And, in fact, you are an active member of STARRS, right?

13 A. Correct.

14 Q. Part of STARRS' mission is to oppose what it calls Marxist
15 collectivism and one-party rule, right?

16 A. Correct.

17 Q. It opposes what it calls politically correct woke
18 policies, right?

19 A. Correct.

20 Q. It opposes diversity and inclusion, race and gender
21 selection criteria, right?

22 A. Correct.

23 Q. We've talked about how you're an active member of STARRS.
24 You attend regular Zoom meetings with this group, right?

25 A. Correct.

1 Q. You've given testimony to this group in the form of
2 offering your opinion about these issues, right?

3 A. Correct.

4 Q. And, in fact, while you were employed by the Department of
5 Defense, you were reporting back to the CEO of STARRS about DoD
6 policies that were under consideration but had not yet been
7 made public?

8 A. Well, I was telling them about ones that were actually
9 assigned but no one would see them for a while. It would take
10 a while for it to really get out there amongst the force. I
11 told them about ones that we nearly did but we changed our mind
12 on, and things like that, yeah.

13 **MR. ROBINSON:** No further questions.

14 **THE COURT:** Thank you very much, Mr. Robinson.

15 Any redirect, Mr. Connolly?

16 **MR. CONNOLLY:** Nothing further.

17 **THE COURT:** Thank you very much, General Walker. And,
18 sir, thank you again for your service to our country during
19 your military service. It was nice to have you here.

20 **THE WITNESS:** Yes, sir.

21 **THE COURT:** You should not talk about your testimony
22 with anyone else when you leave because it may be possible that
23 you're called back to the witness stand. But we're not sure.
24 So I'm going to admonish all the witnesses, when they finish,
25 it's best not to talk about testimony with others because it

1 may be that you're called back by to the witness stand either
2 by Mr. Mortara or by the defense.

3 So with that, thank you very much. You're excused.

4 Mr. Mortara?

5 **MR. MORTARA:** Your Honor, thank you so much. We are
6 ready to call our next witness. I would suggest that we take
7 the afternoon break now. I have to position equipment. Would
8 that be okay?

9 **THE COURT:** That's fine. We'll take a very quick
10 break, and then we'll go and we'll stop promptly at 5:00. So
11 we'll take a brief break.

12 **THE CLERK:** All rise. This honorable court is now in
13 recess.

14 (A recess was taken from 3:43 p.m. to 4:00 p.m.)

15 **THE COURT:** We're ready to proceed here. And,
16 Mr. Mortara, the next witness, I believe, is going to be Melody
17 Hwang. Am I correct?

18 **MR. MORTARA:** That is correct, Your Honor.

19 **THE COURT:** That's fine.

20 **MR. MORTARA:** Plaintiffs call Ms. Melody Hwang.

21 **THE COURT:** Melody Hwang, please.

22 Good afternoon to you. Nice to see you.

23 **THE CLERK:** Good afternoon. Please stand and raise
24 your right hand.

25 (Witness sworn.)

1 **THE CLERK:** Thank you. You can have a seat. Please
2 adjust that microphone. Speak directly into it.

3 **THE WITNESS:** Okay.

4 **THE CLERK:** Please state and spell your first and last
5 name for the record.

6 **THE WITNESS:** My name is Melody, M-E-L-O-D-Y. And my
7 last name is Hwang, H-W-A-N-G.

8 **THE COURT:** The record will reflect that Ms. Hwang has
9 been listed by both parties. And, accordingly, the
10 examinations can be presented in whatever way either counsel
11 desires on that, Mr. Mortara. You've called her as a witness,
12 as has the defense.

13 Anything else, Ms. Yang, on that from your point of view?

14 **MS. YANG:** No, Your Honor. I thought I misheard that
15 she was an expert witness. She's not. She's a --

16 **THE COURT:** Oh, I'm sorry. She not listed as an
17 expert witness?

18 **MS. YANG:** She's not.

19 **THE COURT:** I'm sorry. She's expected to be called,
20 not as an expert. I misread my note here.

21 Sorry, Ms. Hudson. That's my mistake.

22 She's been called both as a witness by both sides.

23 You may proceed, Mr. Mortara.

24 **MR. MORTARA:** Yes, Your Honor. I have should have
25 caught that. First, I need to get something absolutely right.

1 DIRECT EXAMINATION

2 BY MR. MORTARA:

3 Q. Your name is Ms. Melody Hwang?

4 A. Yes.

5 Q. I always endeavor to pronounce names correctly. There's
6 been some confusion about that. I said your name this morning.
7 I said Ms. Hwang. I will call you Ms. Hwang. I just want to
8 make sure I get it right.

9 A. Sure.

10 Q. We didn't meet until just a few moments ago until Ms. Yang
11 introduced us or allowed me to introduce myself to you,
12 correct?

13 A. Yes.

14 Q. My name is Adam Mortara. I'm the lead trial counsel for
15 Students for Fair Admissions.

16 I'm sure the Justice Department has explained a little bit
17 about how this is going to go.

18 MR. MORTARA: But, Your Honor, I need some guidance.

19 THE COURT: That's fine.

20 MR. MORTARA: Must I specifically qualify Ms. Hwang,
21 who works at the Naval Academy, as an adverse witness?

22 THE COURT: No, you don't need to do that. No, you
23 don't need to do that. You're free to call or confirm her,
24 whichever way you want. And Ms. Yang is free to then
25 cross-examine in the same fashion in terms of leading

1 questions. You don't need to worry about that.

2 **BY MR. MORTARA:**

3 Q. And, Ms. Hwang, just for your benefit to your comfort
4 level, what I just meant there is that you're allowed to lead a
5 witness, which is to say to suggest the answer to a question.
6 If I say, "Ms. Hwang, you work at the Naval Academy, correct?"
7 that's a leading question, which you're allowed to do only when
8 you're opponents. And that's what it means to be an adverse
9 witness. Sometimes you hear on TV hostile witness. That's not
10 really what it means.

11 **THE COURT:** Essentially, Rule 607 provides that
12 latitude. You may proceed.

13 **MR. MORTARA:** Thank you, Your Honor. I just wanted
14 to -- we have a lay witness here.

15 **THE COURT:** That's fine. Mr. Mortara, if you see I
16 butchered a witness's name, for years we've had the process, if
17 the second or third time, just refer to me as Judge Benet and I
18 get the message, okay, that I've mispronounced somebody's name.

19 It's Ms. Hwang, correct?

20 **THE WITNESS:** Yes.

21 **THE COURT:** Okay. Ms. Hwang. Okay.

22 **MR. MORTARA:** Thank you, Your Honor. I'm Mr. Mortara,
23 but my contracts professor called me Mr. Montana, and I'm
24 married to woman called Sweet Nicky; so I know a little about
25 this.

1 **BY MR. MORTARA:**

2 Q. Ms. Hwang, now we can get started. Could you please tell
3 the Court your experience with the Academy and the U.S. Navy
4 since high school?

5 A. Sure. I went to the Naval Academy in 2008, is when I
6 joined right, after high school. I graduated from the United
7 States Naval Academy in 2012 with a bachelor of science degree
8 in economics.

9 Shortly -- or after graduating from the Naval Academy, I
10 was temporarily assigned TAD, a temporarily assigned duty,
11 assignment at the Naval Academy for a few months until
12 reporting down to flight school in August of 2012.

13 I was in flight school, but unfortunately did not make it
14 through. And so I redesignated to be a human resources
15 officer. And so after I redesignated to be a human resources
16 officer in the Navy, my first assignment as an HR officer was
17 in the admissions office.

18 And so I reported to the admissions office in February of
19 2014. I remained in the admissions office pretty much since
20 then. I was on active duty until 2020. I got out of the Navy
21 in June of 2020, and then now continue to work there as a
22 civilian employee.

23 Q. And your current title is, Ms. Hwang?

24 A. The director of nominations and appointments.

25 Q. On behalf of Students for Fair Admissions and all of our

1 team, we'd like to thank you for your service. I'm sure the
2 Court would like to do so as well.

3 **MR. MORTARA:** Your Honor?

4 **THE COURT:** Yes, you may go ahead. I'll thank her at
5 the end.

6 **MR. MORTARA:** I was reminding.

7 **THE COURT:** You never know how things go until a
8 witness finishes, Mr. Mortara; so it's better --

9 **MR. MORTARA:** That's true.

10 (Laughter.)

11 **BY MR. MORTARA:**

12 **Q.** So you said you've been working with admissions since
13 February of 2014; is that right?

14 **A.** Yes.

15 **Q.** And so you've seen about 10 cycles; is that right?

16 **A.** Yes.

17 **Q.** Okay. Although you're a civilian employee at the Naval
18 Academy right now, I assume you still feel bound to follow the
19 directives of the superintendent and the dean, correct?

20 **A.** Yes.

21 **Q.** And you feel bound to follow Department of Navy directives
22 that govern the admissions process as well, correct?

23 **A.** Yes.

24 **Q.** And you feel similarly bound to follow Department of
25 Defense directives to the extent they govern any aspect of the

1 admissions process, correct?

2 A. Yes.

3 Q. Your immediate supervisor is Dean Bruce Latta, correct?

4 A. Yes.

5 Q. He is here, correct?

6 A. Yes.

7 Q. Did you know he was going to be here before you were going
8 to testify today?

9 A. Yes.

10 Q. To start off our discussion on the admissions process,
11 could you please explain to the Court briefly the different
12 types of congressional nominations?

13 A. Sure. So the congressional nominations can be submitted
14 by the U.S. representatives, the House of Representatives. So
15 the congressmen, the delegates of DC, the governor of Puerto
16 Rico. So everybody that represents the House as well as the
17 senators.

18 Q. Are there different types of nomination processes that
19 congressmen use?

20 A. Yes.

21 Q. Could you explain what those are?

22 A. Sure. So each office has their own nominations process,
23 and each office kind of sets their own application
24 requirements, their guidelines, their deadlines. And so all of
25 the students have to reach out to their individual congressmen

1 and senators' offices to acquire information about what is
2 required for their nomination application. And then the
3 students will have to abide by those deadlines, guidelines,
4 requirements in seeking congressional nominations.

5 Q. And when the nominations are presented to you, I
6 understand they're presented in a few different ways, a few
7 different types of slates.

8 Could you explain what those are.

9 A. Yes. So there are three different methods in which an
10 office can submit their nominations. One of the ways in which
11 an office can submit their nomination is the competitive
12 method. And this just means that the congressmen or the
13 senators, they are not ranking their nominations. So they are
14 just giving us a list of now 15 names, the 15 nominees that
15 they are wanting to nominate from their office. And this
16 competitive method allows the Naval Academy to make an offer to
17 who we feel is the most competitive candidate from that list of
18 nominees.

19 And then the other method is called the principal method.
20 And this is when the congressman or senator is telling us who
21 their, essentially, number one nominee is. And so if the
22 senator or congressman designates a principal nominee, that is
23 telling us, the Naval Academy, that we have to look at their
24 principal nominee first to give an offer to if they are found
25 qualified by the admissions board.

1 If the principal nominee for some reason is found not
2 qualified by the admissions board, then the congressman or
3 senator can either rank their alternates to come behind the
4 principal nominee or they can just submit a competitive
5 alternates list, which is similar to the competitive slate
6 where they're not ranking the alternates.

7 And so if the congressmen and senators decide to rank
8 their alternates, then we have to go in that order down the
9 list. If the principal is found not qualified, then we'll have
10 to go on to the first alternate to make an offer. If that
11 first alternate is not found qualified, then the second
12 alternate, et cetera.

13 On a competitive alternate slate behind a principal, if
14 the principal is found not qualified, then we can just go to
15 the pool of competitive alternates. And then we can, at the
16 Naval Academy, make an offer to who we feel is the most
17 competitive alternate on that slate.

18 **Q.** Ms. Hwang, I think you've told us that about 65 percent of
19 the slates are competitive, correct?

20 **A.** Yes.

21 **Q.** And that means the other 35 percent are principal nominee
22 method, correct?

23 **A.** That is correct.

24 **Q.** And in that other 35 percent, those can have what you
25 called competitive alternates, correct?

1 A. Yes.

2 Q. So no matter what, in a given year, the majority of slates
3 will give the Academy some possible discretion to select a
4 slate winner, correct?

5 A. That's correct.

6 Q. And because of what you just told me about the principal
7 nominee and competitive alternates, it's actually quite
8 possible it's a significant majority, correct?

9 A. Could you -- significant majority for?

10 Q. 65 percent are competitive already?

11 A. Yes.

12 Q. Some percentage of the principal nominees can have a
13 competitive alternate?

14 A. Sure.

15 Q. So it's probable that a significant majority of the slates
16 will allow some discretion to the Naval Academy in selecting a
17 slate winner; is that right?

18 A. Yes.

19 Q. We'll come back to -- oh, one thing. This is the thing I
20 worked out with the court reporter before. What is a
21 nom-assist?

22 A. A nom-assist, it stands for nomination assist. And that
23 is when I am specifically helping a candidate acquire a
24 nomination.

25 Q. So am I right in saying this is where the candidate is

1 qualified, you'd like to admit the candidate, the candidate
2 still needs a nomination, and the Naval Academy helps the
3 candidate get the nomination?

4 A. Yes.

5 Q. And I think you told us that happens about 20 to 30 times
6 a year?

7 A. Yes.

8 Q. So it wouldn't be totally correct to say the Naval Academy
9 has no control over the nomination process. You sometimes ask
10 for them and get them, right?

11 A. Sure.

12 Q. I want to put on the screen something that was said in
13 court today and just make sure we agree it's not totally
14 correct.

15 This is from this morning. "Importantly, the Naval
16 Academy has no -- let me emphasize this -- no control over
17 which candidates members of Congress nominate."

18 Sometimes you ask a member of Congress to nominate, and
19 they do, right?

20 A. Yes, but they can also say no.

21 Q. Right. But have you some -- mostly they say yes when you
22 ask, right?

23 A. Actually -- well, there are offices that do say no as
24 well. So...

25 Q. Would you say the majority of the time they say yes or

1 not?

2 A. Yes.

3 Q. So the Naval Academy has some control over getting
4 nominations for these candidates that don't have one yet?

5 A. Yes.

6 Q. You're also on something called the slate review
7 committee?

8 A. Yes.

9 Q. What does a slate review committee do?

10 A. The slate review committee, we review the congressional
11 slates as they are submitted. The ultimate goal of the slate
12 review committee is to designate a slate winner who then
13 becomes the charge to that office. And then, of course, the
14 slate winners get offers to the Naval Academy as well.

15 Q. What is a slate decline?

16 A. A slate decline is when a student that we've designated as
17 a slate winner declines their offer.

18 Q. And sometimes you assemble lists of alternates on
19 something we call on our side the slate declines email. I
20 don't know what you call it. You do that, though, right?

21 A. Yes.

22 Q. We're going to come back to that in a little bit. I'll
23 show you one of those examples. It's actually in your binder,
24 but you don't have to turn to it yet.

25 A. Okay.

1 Q. The admissions board is ultimately responsible for the
2 holistic determination that a candidate is qualified to attend
3 the Naval Academy, correct?

4 A. Yes.

5 Q. But the dean or superintendent can override the board
6 recommendations, right?

7 A. Yes.

8 Q. Could you turn in your binder for Plaintiff's Exhibit 491.
9 You can also follow along on the screen, but I just wanted to
10 make sure you have the whole document in front of you.

11 What is Plaintiff's Exhibit 491?

12 A. This is the training that is given to the admissions board
13 members every year.

14 Q. And you're familiar with the admissions board training
15 document, Plaintiff's Exhibit 491, correct?

16 A. Yes.

17 Q. This document is the brief provided to the admissions
18 board during admissions board training week; is that right?

19 A. Yes.

20 MR. MORTARA: Your Honor, this is already admitted. I
21 don't need to offer it.

22 THE COURT: That's fine.

23 BY MR. MORTARA:

24 Q. A version of this is provided every year, correct?

25 A. Yes.

1 Q. And this version is, I think you told us, from 2023,
2 right?

3 A. I do not remember saying it's from 2023.

4 Q. Excuse me. I've misheard you.

5 Turn to page labeled 0735, which is about 40 pages into
6 the document. I'll wait for you to get there or you can follow
7 along on the screen, however you wish to do it, Ms. Hwang.

8 A. Okay.

9 Q. This is a portion of the presentation called
10 "Superintendent's Guidance," correct?

11 A. Yes.

12 Q. And that means what it says, right?

13 A. Yes.

14 Q. Okay. Let's go a few slides ahead. And there's a slide
15 titled "The Board Shall Consider Diverse Experiences," right?

16 A. Yes.

17 Q. It's on this page where the presentation actually starts
18 talking about some of the specific types of diversity or
19 experience that the board should be looking for, correct?

20 A. Yes.

21 Q. And you see a list of items on the first page. I won't
22 read it into the record. I see His Honor is looking at them
23 now.

24 The second page has an additional list. Still going on,
25 correct?

1 A. Yes.

2 Q. And the third page has one last item. "Race, ethnicity,
3 or gender should not be the basis for points in favor of an
4 applicant but can be considered as one of your many factors."

5 Is that right?

6 A. Yes.

7 Q. This is telling the board that it cannot award a RAB or a
8 bonus to the WPM for race but can consider it as one factor in
9 the board's overall work, correct?

10 A. Yes.

11 Q. I think I want you to turn to Plaintiff's Exhibit 1 in
12 your binder now. This is a PowerPoint entitled "Office of
13 Admissions Dean's Meeting."

14 This is otherwise known as the dean's brief; is that
15 right?

16 A. Yes.

17 Q. That's otherwise prepared for Dean Latta, correct?

18 A. Yes.

19 Q. And it is prepared for use in meetings with the dean that
20 occur on mostly a weekly basis but sometimes you miss one; is
21 that right?

22 A. Yes.

23 Q. So three Tuesdays a month; but sometimes the first
24 Tuesday, you don't have it?

25 A. Correct.

1 Q. If you look at the next slide. The first slide in the
2 dean's brief is about STEM applicants. I assume this is the
3 Naval Academy, correct?

4 A. Our STEM camp applications.

5 Q. Oh, sorry. STEM camp.

6 A. Yes.

7 Q. And I noticed there's running marks based on totals from
8 the previous years. The dean likes to be informed how things
9 are comparing to previous years?

10 A. Yes.

11 Q. And summer STEM is an outreach program put on by the
12 Academy, right?

13 A. Yes.

14 Q. That's basically a summer camp, as you said, right?

15 A. Yes.

16 Q. And then what appears on the next three slides for Dean
17 Latta are data on racial goals for applications to the STEM
18 summer program, correct?

19 A. Yes.

20 Q. And also along with comparisons to previous years, right?

21 A. Yes.

22 Q. And skipping ahead now a few slides to STEM selections.
23 Tell me when you've got there.

24 A. Yes.

25 Q. You see that there are goals for race and sex as well,

1 correct?

2 A. Yes.

3 Q. On the next slide we have something called NASS
4 applicants. NASS is the Naval Academy Summer Seminar, which I
5 gather is the final big on-campus outreach program for people
6 starting their senior year of high school. Is that right?

7 A. Correct.

8 Q. And, again, we have three slides after that of racial
9 goals for NASS applicants, correct?

10 A. Yes.

11 Q. And then two slides later, we have another slide that
12 shows overall goals by race and sex, correct?

13 A. Correct.

14 Q. The next slide is entitled "2027 Class Stats, 14
15 March 2023." Do you see that?

16 A. Yes.

17 Q. I want to take a little bit of time with this. A version
18 of this slide is included in every dean's brief in your time at
19 the Academy, correct?

20 A. Correct.

21 Q. And has Dean Latta ever expressed at the dean's brief
22 meeting that he did not want to see this slide anymore?

23 A. No.

24 Q. This slide is about Naval Academy applications and
25 admissions to date, correct?

1 A. Yes.

2 Q. And the goal here is to kind of see year over year where
3 you are in these categories that are at the top compared to
4 where you were the previous year, correct?

5 A. Correct.

6 Q. Tell me what column titles mean starting where it says
7 "MIN."

8 A. Sure. So MIN stands for minority. AA means for African
9 American; HI means Hispanic; AS/OT means Asian/other.

10 Q. I want to just ask you about the Asian/other column first.
11 On this slide in the dean's brief that he gets at least three
12 times a month, Asian is not broken out by different subgroups
13 like Filipino, Japanese, Vietnamese, Indian, et cetera, is it?

14 A. Correct.

15 Q. Just out of curiosity, where do Lebanese Americans fit
16 into this taxonomy?

17 A. I do not know. It would depend on what the candidate
18 designated on their application.

19 Q. What is the difference between apps and candidates?

20 A. So the total number of applications that we receive
21 includes all of the open applications, the preliminary
22 applications for that year. A student can submit a preliminary
23 application, but not all of them will convert into an official
24 candidate.

25 You have to become an official candidate in order to be

1 able to continue on with the rest of the application process
2 and complete the actual application for admission into that
3 Naval Academy class.

4 Q. And I think you told us at your deposition, the reason the
5 two numbers are similar here is that the Academy was at this
6 time running a test flexible admissions program where you were
7 not requiring the SAT or ACT?

8 A. That is correct.

9 Q. And that earlier when you had the requirement to take
10 those tests, there was a test threshold to convert the
11 application from application to candidacy; is that right?

12 A. Yes.

13 Q. You said you weren't sure, but you thought the old
14 threshold was 600 math and 600 verbal?

15 A. Correct.

16 Q. Did you remember now what it was? I think you weren't
17 sure at the time.

18 A. I still am unsure of it.

19 Q. But you did think the threshold would be reestablished
20 this year because -- or, I think, this year, yes, because the
21 Academy was requiring SATs again?

22 A. That is correct.

23 Q. Has it been reestablished?

24 A. I actually do not know. I know we are requiring SAT or
25 ACTs for this cycle, but I don't know if the -- if it has been

1 factored back into the designation of candidates.

2 Q. Thank you, Ms. Hwang.

3 So we have the dean getting what I will call racial stats
4 on this slide. Just to confirm on the next slide, the dean
5 also receives his racial stats by region, correct?

6 A. Yes.

7 Q. Including in the same designators, MIN, AA, HI, and AS/OT
8 that you described before, correct?

9 A. Yes.

10 Q. You also, as we talked before, sometimes prepare slate
11 decline emails, what I called slate decline emails. Again, a
12 slate decline is a slate that has candidates that declined
13 their offer when we made an offer to them, "we" being the Naval
14 Academy?

15 A. Yes.

16 Q. And you make lists of proposed replacements and sometimes
17 send those lists to Dean Latta, correct?

18 A. Yes.

19 Q. Could you turn to Plaintiff's Exhibit 497.

20 Do you have it?

21 A. Yes.

22 Q. This is an example that I think you saw at your
23 deposition, correct?

24 A. Yes.

25 Q. And what appears on the page after the blue page is a

1 redacted version of your recommendations for how to replace
2 slate declines organized by congressional district, correct?

3 A. Yes.

4 Q. The first question I have is I see in some places --
5 that's not what I wanted. I see in some places the word "or."
6 And I wanted to understand, in what context would you have the
7 ability to select one candidate or another?

8 A. For the districts where there is an or option, that just
9 meant that there are -- there is more than one option to be the
10 backup slate winner. And so it depends on the slate. Most of
11 the time, the ors would probably be competitive slates because
12 our hands are kind of tied on the principal slates.

13 So if the principal was the one that declined and there
14 were numbered alternates behind them, then we would have to go
15 down in that order, as I mentioned earlier. But if they were
16 competitive alternates or competitive nominations, then we do
17 have the option to make the offer to the most qualified
18 candidate. And so that's why I identified multiple candidates
19 as an option.

20 Q. Would these be two candidates that necessarily had the
21 same WPM, or are you allowed some discretion to pick one with a
22 lower WPM?

23 A. All of the above. So they are either close in
24 whole-person multiple or there was already somebody that we
25 made an offer to. There may be somebody already in prep; so

1 we're kind of assuming that they're going to be in the class,
2 and so we can just make that prep student a slate winner
3 without having to make a new offer. So there can be various
4 scenarios.

5 Q. And race could be one reason you selected an alternate
6 slate winner over another, correct?

7 A. It can be, but it wouldn't be because of just race.

8 Q. It would be one of many factors?

9 A. Sure.

10 Q. Sure. Thank you.

11 I also noticed that there is a lot of race and gender
12 information on this slate decline list, correct?

13 A. Yes.

14 Q. That's information that you think Dean Latta wants to see,
15 correct?

16 A. Yes.

17 Q. Okay. I have only a few more questions. I want to shift
18 to some things that -- well, I want to shift to some things
19 about the admissions process.

20 A. Okay.

21 Q. There's a field for race on the application that's
22 populated from the box the applicant checks for himself or
23 herself, correct?

24 A. Yes.

25 Q. But to the extent that race or ethnicity can be a factor

1 in the admissions process, it doesn't matter in what form it
2 appears in the file, correct?

3 A. Could you state that again, please.

4 Q. Well, for example, a candidate might be -- I think you
5 have this phrase -- "does not specify" or "does not respond,"
6 or there's a group of kids who just don't say what their race
7 is on the checkbox?

8 A. Yes.

9 Q. If that applicant says what their race is maybe in one of
10 their essays, you'd use that information, right?

11 A. Yes.

12 Q. So my question was, to the extent that race or ethnicity
13 can be a factor in admissions, it doesn't matter in what form
14 it appears or where it comes in the candidate's file?

15 A. Yes.

16 Q. But if all someone does is check the box and doesn't
17 mention anywhere in their essays or anywhere else in their
18 application, you could still give their race consideration just
19 from the check of the box, right?

20 A. Yes.

21 Q. The Naval Academy has been using race in admissions the
22 entire time that you've been there, correct?

23 A. Yes.

24 Q. And during that time, the reason why race is used as one
25 of those factors in the admissions process has not changed,

1 correct?

2 A. Correct.

3 Q. And during the time you've worked in the Naval Academy,
4 the way in which race is used as a factor in admissions has
5 also not changed, correct?

6 A. Correct.

7 Q. I want to finish with just a few things that I don't think
8 you know. You don't have any understanding as to what criteria
9 the Naval Academy has for when it would consider ending the use
10 of race as a factor in its holistic admissions process,
11 correct?

12 A. Correct.

13 Q. You are unable to say what the racial composition of the
14 class would look like if race was no longer a factor versus
15 what it looks like today, correct?

16 A. Correct.

17 Q. And you cannot give us any quantification or range at all
18 about that, correct?

19 A. Correct.

20 MR. MORTARA: I have no more questions, Your Honor.

21 THE COURT: Thank you, Mr. Mortara.

22 And with that, Ms. Yang.

23 MS. YANG: Yes. Thank you.

24 THE COURT: Am I pronouncing your name correctly?

25 MS. YANG: You are.

1 **THE COURT:** Thank you very much.

2 **MS. YANG:** I have a couple of binders that I'm happy
3 to hand out to you, plaintiff's counsel.

4 And, Your Honor, may I approach the bench?

5 **THE COURT:** Just bring it over to the clerk. I'm
6 looking it up on the screen. I'm following it on the screen
7 here.

8 **MS. YANG:** I bring this to you because there's one
9 exhibit that we will not put on the screen due to sensitive
10 student information, but it's in the binder for your
11 opportunity to review.

12 **CROSS EXAMINATION**

13 **BY MS. YANG:**

14 **Q.** Good afternoon, Ms. Hwang.

15 **A.** Good afternoon.

16 **Q.** In addition to your degree from the U.S. Naval Academy, do
17 you have hold any other degrees?

18 **A.** Yes. I have a MBA with a human resource component from
19 Liberty University.

20 **Q.** When did you assume your current role as the director of
21 nominations and appointments?

22 **A.** 2018.

23 **Q.** Who do you report to in that role?

24 **A.** The dean of admissions.

25 **Q.** As the director of nominations and appointments, are you a

1 member of the slate review committee?

2 A. Yes.

3 Q. Now, earlier you discussed the slate review committee.

4 Could you remind the Court what the slate review committee
5 does?

6 A. Yes. So the slate review committee is comprised of
7 myself, Dean Latta, and the director of candidate guidance.
8 And during the slate reviews, we will usually have a
9 representative from the region as well, whether it's an
10 admissions counselor or the regional director.

11 So when we're going through the slates, usually the first
12 look is to identify which records we need to be completed so
13 that they can get to the admissions board so that the
14 admissions board can make a decision on them first before we
15 can make a slate winner decision.

16 So once the applications have been to the board, if that
17 is all done on the first look, then that's great. We can make
18 a slate winner decision right then and there. But most
19 oftentimes we have to do a second look on the slate to make a
20 slate winner decision after all of the records that we needed
21 have been to the board.

22 Q. Is the slate review committee the same thing as the
23 admissions board?

24 A. No.

25 Q. Now, before we get deep into the admissions process, I'd

1 like to revisit one of the documents that plaintiff's counsel
2 just showed you, which was Mike Pusterlai.

3 So, Errol, could we put up that, please.

4 Unfortunately, I don't have the specific slide number that
5 plaintiff's counsel used with you, but do you remember seeing
6 some slides that discussed NASS summer seminar as well as STEM?

7 A. Yes.

8 Q. What are those programs?

9 A. The Naval Academy Summer Seminar is one of our summer
10 programs. It is for students going into their senior year.
11 It's an opportunity for those students to come to the Naval
12 Academy and kind of experience life as a midshipmen to see if
13 it would be a good fit for them and then to go back home and
14 complete the rest of their application.

15 The summer STEM camp is a program for rising ninth, tenth,
16 and eleventh grade students. While it is still at the Naval
17 Academy, it's a lot less military-centric, military-focused.
18 It's kind of more of a summer camp for students who are
19 interested in STEM careers but, by nature of it being at the
20 Naval Academy, we do expose them to life as a midshipman.

21 All of the midshipmen serve as their camp counselors or
22 squad leaders. And so the camp attendees are able to ask any
23 questions about the Naval Academy that they may have and still
24 learn about the Naval Academy while they're attending STEM
25 camp.

1 Q. Thank you.

2 And just so the Court is following us, the slides that you
3 were shown regarding summer seminar as well as STEM camp, did
4 those pertain to admissions to the Naval Academy?

5 A. Not to the Naval Academy. It was just to those specific
6 programs.

7 Q. Approximately what proportion of each admitted class is
8 made up of students with congressional nominations?

9 A. More than 80 percent.

10 Q. Why do students with congressional nominations account for
11 so much of each admitted class?

12 A. So it is a Title X requirement that students do have at
13 least a nomination in order to be accepted into the Naval
14 Academy. Congressional nominations are just probably the
15 biggest and most common sources of nominations. And so a lot
16 of students -- we want to try to represent as many
17 congressional districts as we can; so that's probably why
18 there's a big representation of congressional noms in each
19 class.

20 MS. YANG: Let's put up Defendants' Exhibit 15,
21 please.

22 And, Your Honor, this document is not objected to.

23 THE COURT: That's fine. Again, Local Rule 107.5
24 provides, if counsel exchanged exhibits and there's no
25 objection, then they're automatically deemed admitted when

1 they're presented here in court.

2 **BY MS. YANG:**

3 **Q.** Ms. Hwang, do you recognize this exhibit?

4 **A.** Yes.

5 **Q.** What is it?

6 **A.** The charging memo for the class of 2027.

7 **Q.** And can you explain for the Court what a charging memo
8 does.

9 **A.** Sure. So the charging memo just identifies where -- which
10 nomination source or charging category each class -- each
11 midshipmen in that class was charged to.

12 **Q.** Are these numbers for the various appointment categories
13 generally pretty consistent across classes?

14 **A.** Yes.

15 **Q.** And on this document where it has the number 564 next the
16 word "congressional," what does that mean?

17 **A.** It means that 564 midshipmen in the class of 2027 were
18 charged to a congressional nomination source.

19 **Q.** Are those the only midshipmen in this class with
20 congressional nominations?

21 **A.** No.

22 **Q.** Where else on this document reflects midshipmen with
23 congressional nominations?

24 **A.** The qualified alternates category as well as the
25 additional appointees category.

1 Q. Now, Mr. Mortara touched on this briefly with you, but
2 could you remind the Court who decides which students a member
3 of Congress will nominate.

4 A. The office -- the members themselves.

5 Q. What control does the Naval Academy have over the racial
6 composition of the students nominated by members of Congress?

7 A. None.

8 Q. Is there a racial group that receives the majority of
9 congressional nominations?

10 A. Yes.

11 Q. What group is that?

12 A. White students.

13 Q. Are there certain districts that typically nominate fewer
14 minorities than White students?

15 A. Yes.

16 Q. Just for illustrative purposes, could you give the Court a
17 couple examples.

18 A. Sure. So states such as Vermont, South Dakota, North
19 Dakota, they generally are made up of constituents that have
20 less minority populations. And so, naturally, the offices are
21 nominating constituents from their home state and districts
22 that are not minority students.

23 Q. Does the Naval Academy provide any training to the
24 congressional offices on nominations?

25 A. Yes.

1 Q. What sorts of efforts?

2 A. So the Naval Academy has two trainings a year at the Naval
3 Academy for congressional staffers. We invite the
4 congressional staffers to come to the Naval Academy to learn
5 about the admissions process, the nominations process, and kind
6 of get into the intricacies of the nominations process -- so
7 how they can nominate, what type of students they should be
8 looking to nominate, basic usage of the portal that they use to
9 submit their nominations. So those are the trainings that the
10 Naval Academy hosts.

11 But we also hold admissions forums and invite staffers to
12 those forums as well. And so when the staffers come to the
13 admissions forums when they sit in on the whole program,
14 essentially, they are also able to obtain more knowledge by
15 just being a member present at the admissions forum.

16 Q. I believe your answer earlier referenced that for the
17 trainings that occur at the Naval Academy, among the topics
18 that are discussed are the types of students that the members
19 of Congress should be looking to nominate.

20 So could you -- could you elaborate on what you -- what
21 sort of training you provide to the members of Congress on that
22 topic.

23 A. Sure. We always tell the staffers that -- because a lot
24 of times the staffers in the offices, the nomination panelists
25 for those offices, a lot of times they will get very focused on

1 their academics or their transcripts or their test scores. So
2 I always just try to emphasize that, while those things are
3 important, there's other factors that they should also be
4 considering, such as any leadership experience that they've
5 had, unusual life experiences, if they are the first in their
6 family to attend college, maybe they're first-generation
7 American, if they have a cultural or diverse background, that
8 can somehow attribute to the brigade of midshipmen, even if
9 they're maybe a little bit weak in academics, knowing that we
10 also have prep programs that we can put students into for a
11 year to make them stronger in academics.

12 So if the office does see a student who has great
13 potential to be a leader and a Naval officer, don't let weak
14 academics persuade them from not nominating that individual;
15 like, still nominate that individual so that it can kind of
16 highlight to us all the other phenomenal attributes of this
17 candidate. And if it's academic help that they may need, then
18 we may be able to assist them by sending them to one of our
19 preparatory programs.

20 Q. Have those efforts to train the members of Congress been
21 successful in increasing the diversity of congressional
22 nominations?

23 A. I would say minimally, if at all.

24 Q. And can you elaborate on that, please.

25 A. Yes. So we -- there are many offices where the members

1 have been in office for a very long time. And a lot of times
2 their staffers also have been doing their nominations process
3 for a very long time.

4 So while, you know, college admissions is changing, while,
5 you know, the student -- while there's many things that are
6 changing in the world and all of these updates are provided to
7 the staffers and all of these tips and training are provided to
8 the staffers, ultimately, sometimes the offices just continue
9 to do what they know and what they've been doing for a very
10 long time.

11 And so the training is offered, but there's, you know,
12 only so much that can be forced from our end.

13 Q. Let's look at the next document, which would be
14 Defendants' Exhibit 91.

15 This one also has not been objected to. And we'll show
16 this page 2 here, the nominations and appointments brief.

17 Do you recognize this document?

18 A. Yes.

19 Q. What is it?

20 A. This is the training brief that I provide to various
21 audiences.

22 Q. And let's go to page 9, please. The third bullet point on
23 this slide talks about nominating systems.

24 Do you see that?

25 A. Yes.

1 Q. And in the two principal methods, if the principal nominee
2 is fully qualified, what does that mean for the Naval Academy?

3 A. If the principal is fully qualified, we have -- if we're
4 going to fill that vacancy, we have to make the offer to the
5 principal.

6 Q. Does it matter how the principal nominee compares against
7 the other students on that slate?

8 A. No.

9 Q. Approximately what percentage of congressional nominations
10 use the principal nominating methods?

11 A. About 35 percent.

12 Q. Has the Naval Academy done anything to try to get members
13 of Congress to use the competitive method of nomination instead
14 of the principal methods?

15 A. During training and if the staffers ask, I will say that
16 the Naval Academy does prefer the competitive method only
17 because that gives the Naval Academy the most flexibility for
18 us to be able to make an offer to who we feel is the most
19 competitive candidate, but ultimately it is up to the office to
20 decide which method they want to use.

21 Q. Thank you.

22 Thanks, Errol.

23 Now, plaintiff's counsel asked you some questions about
24 nomination assists. And what are the circumstances in which
25 you pursue a nomination assist?

1 A. I pursue nomination assists mainly for our recruited
2 athletes. But also sometimes our students that are in our
3 preparatory programs fail to get another nomination during
4 their prep year in order to matriculate into the next Naval
5 Academy class; so I will do nomination assists for our prep
6 students and then our students who already have an LOA. So we
7 gave them a conditional offer, but they were not able to secure
8 a nomination; and so I'll do nomination assists for those
9 students as well.

10 Q. Do you pursue any nomination assists because of a
11 candidate's race or ethnicity?

12 A. No.

13 Q. Does the Naval Academy consider a candidate's race or
14 ethnicity in determining them qualified or not qualified?

15 A. No.

16 Q. Let's look at another document that plaintiff's counsel
17 showed you earlier. This will be Plaintiff's Exhibit 491. And
18 I believe they put up the slide ending in Bates Number 740.

19 Errol, can we go to that slide, please, 740.

20 **THE COURT:** You might want to go to our next topic if
21 you're having trouble retrieving it.

22 **BY MS. YANG:**

23 Q. Tell you what. Let's pull this down, but, Ms. Hwang, you
24 have the document in front of you.

25 **MS. YANG:** And Your Honor should have the documents as

1 well.

2 **THE WITNESS:** Yes.

3 **BY MS. YANG:**

4 **Q.** So on this page ending in Bates Number 740, do you
5 remember that this was one of the slides that plaintiff's
6 counsel showed to you?

7 **A.** Yes.

8 **Q.** Can you explain why the superintendent's guidance to the
9 admissions board says that they can consider race as one of
10 many factors if the board does not consider race in determining
11 a candidate qualified or not qualified?

12 **A.** Yes. So the admissions board does determine whether or
13 not a candidate is qualified, but the admissions board can also
14 determine a candidate to be early notify, which is kind of a
15 branch of the qualified piece. And then if a student is not
16 qualified, the admissions board can recommend them for a prep
17 offer or to be in the prep pool. And the admissions board can
18 consider race or ethnicity or gender in determining if a
19 student is early notified or not qualified prep pool,
20 essentially.

21 **Q.** And so just to reiterate, does the Naval Academy consider
22 a candidate's race or ethnicity in determining them qualified
23 or not qualified?

24 **A.** No.

25 **Q.** Does the admissions office have any guidance on whether a

1 candidate's race can be the basis for points?

2 A. Yes.

3 Q. What is that guidance?

4 A. That it cannot be the basis for points.

5 Q. Now, I believe plaintiff's counsel asked you some
6 questions about a minimum standardized test score to get a
7 candidate number.

8 Do you remember those questions?

9 A. Yes.

10 Q. Can you explain what you're thinking of when you talk
11 about a minimum test score in that context.

12 A. I don't know what the minimum test score threshold is. I
13 always thought it was 600, 600 in the math and the verbal
14 sections of the ACT and SAT. But I don't know that that's
15 accurate.

16 If a student -- prior to the COVID era and possibly now
17 again, if a student didn't meet certain minimum thresholds,
18 then the system didn't generate a candidate number for them.
19 But it is possible to manually assign them a candidate number;
20 they just would not have automatically received a candidate
21 number by the system.

22 Q. Is there a department in the admissions office that would
23 handle manually assigning a candidate number to a student?

24 A. Yes.

25 Q. Which department is that?

1 A. The candidate guidance department.

2 Q. And what is that in relation to your role in nominations
3 and appointments?

4 A. It's a different department within the office of
5 admissions.

6 Q. Is there a minimum test score required for a candidate to
7 be qualified by the admissions board?

8 A. No.

9 Q. Is there a minimum test score required for a candidate to
10 receive an offer from the Naval Academy?

11 A. No.

12 Q. Why doesn't the Naval Academy have a minimum test score
13 requirement?

14 A. We conduct a whole-person assessment on every single
15 applicant. And so we don't put a minimum requirement on the
16 test score because, for a student that has low test scores,
17 there can be other factors of the application that are
18 significant enough for us to consider that student to be
19 overall qualified or having other qualities that would benefit
20 the brigade of midshipmen.

21 And so we don't have a minimum test score because,
22 overall, we just look at all of the contents of the application
23 to determine whether or not a student is qualified for
24 admissions.

25 Q. Let's go back to Defendants' Exhibit 91, please. And

1 we'll put up page 11.

2 Can you explain to the Court what slate review is.

3 A. Yes. So slate review is the process in which we review
4 the slates that are submitted by the congressional offices.
5 Ultimately, our goal is to designate a slate winner on every
6 slate so that that office can have a midshipman charged to them
7 for that year, and then of course that slate winner would get
8 an offer to the Naval Academy.

9 Q. Is the admissions board doing slate review?

10 A. No.

11 Q. Who's doing slate review?

12 A. The slate review committee.

13 Q. Let's look at Defendants' Exhibit 156, please.

14 Actually, sorry. We're not going to put this document up
15 on the screen, but everyone has that document in their binders.

16 And, Ms. Hwang, if you could turn to the attachment,
17 please, and tell the Court what the attachment shows.

18 A. Oh. This is a report that I created for the regions for
19 the admissions counselors and the regional directors to use in
20 preparing for a slate review.

21 Q. And so is this the information that would be the type of
22 information that would be reflected in the slate review module?

23 A. Yes.

24 Q. Now, it looks like most of the applications for this
25 particular district that we're looking at are still incomplete

1 at this point in time?

2 A. Yes.

3 Q. So at what point in time does the slate review committee
4 decide on the slate winner for a congressional district?

5 A. I think it would kind of -- well, it would depend on the
6 type of slate it is. So if it is a principal slate, if the
7 principal has been to the board and found -- been found
8 qualified already, then we would be able to designate a slate
9 winner right then and there because, if it's a principal slate,
10 we have to make an offer to the principal.

11 So if the principal is qualified, then we have a slate
12 winner. It's going to be the principal nominee. That
13 principal will get an offer. And then as long as that
14 principal shows up on induction day and takes the oath, that
15 will be their charge.

16 If it's a competitive slate, then we need all of the
17 records that are kind of going to be players for the slate
18 winner slot. And what I mean by that is students who are kind
19 of relatively close in whole-person multiple to see how close
20 their applications are, what ends up happening to them at the
21 admissions board.

22 And so we can't make a slate winner decision on those
23 competitive slates until all of those applications that we need
24 have been to the admissions board.

25 Q. Is the information reflected in this attachment the only

1 information the slate review committee looks at when making
2 admissions decisions?

3 A. No.

4 Q. What else are you looking at?

5 A. Before we make an offer to any student, which includes
6 potential slate winners, before even designating them as a
7 slate winner, we pull up the records again just to make sure
8 that we are reviewing the whole entire record, that the
9 admissions board didn't mistakenly leave something out or make
10 any mistakes on their review.

11 So we pull -- the slate review committee pulls up each
12 record before designating somebody as a slate winner and then,
13 obviously, offering them an appointment.

14 Q. And so just as an example, plaintiff's counsel showed you
15 the document that was marked Mike Pusterla497 -- that was what
16 he called the slate declines email -- and asked you some
17 questions about that.

18 Do you remember that?

19 A. Yes.

20 Q. So, first, is that document a document that that the slate
21 review committee uses?

22 A. No.

23 Q. Do you make any decisions off of that document?

24 A. No.

25 Q. What do you make decisions off of?

1 A. So that document I kind of use just as a guide to focus
2 our efforts in an effort to be efficient with our time. And so
3 I can use that document to kind of guide us which districts to
4 look at.

5 And then if we are looking at a specific district and the
6 potential slate winner backup, we then go to that district,
7 pull up the slate again, pull up the whole entire application
8 again, and review the whole thing before making a slate winner
9 decision.

10 Q. Is anyone on that list reflected in Mike Pusterla497 not
11 fully qualified to receive an offer?

12 A. No.

13 Q. And can you tell the Court how you came up with the
14 candidate that was listed for each of the districts reflected
15 in that document?

16 A. Sure. So the candidates that are listed as slate winner
17 backups, it would also depend on the type of slate it was. So
18 if it was a principal slate with numbered alternates, then it
19 would just be the next person in order that would serve as the
20 slate winner backup.

21 If it was a competitive slate, then most oftentimes it
22 would just be the next person with the next highest
23 whole-person multiple.

24 Q. Are any of the districts listed on this attachment to Mike
25 Pusterla497, are any of the districts listed here

1 underrepresented districts?

2 A. Yes.

3 Q. And I don't think we've talked about this yet today; so
4 could you please explain to the Court what an underrepresented
5 district is?

6 A. Sure. An underrepresented district is any -- our
7 congressional districts that we have designated as being
8 underrepresented. And there are many ways in which a district
9 can become underrepresented.

10 Most oftentimes it is either their charges in the brigade
11 are not filled. So that office does not have -- you know, out
12 of the allotted five midshipmen that they're allowed to have in
13 the brigade, they are not filling those spots. So there's
14 either one or two midshipmen in the brigade that are
15 represented of that district.

16 Other factors can be that the district historically does
17 not submit nominations either at all or they're completed
18 allotment of nominations. So they're allowed to submit up to
19 15 nominations per vacancy that they have. And if they have a
20 history of only nominating one, two, or a handful instead of
21 all 15, we can also designate it as an underrepresented
22 district.

23 Q. How do underrepresented districts factor into any
24 decisions the slate review committee makes?

25 A. Underrepresented districts factor into decisions that we

1 make as a slate review committee because we want to ultimately
2 try to get it off of our underrepresented districts list. So
3 if they are submitting more than one vacancy, then we will make
4 an effort to fill both vacancies so that we can increase the
5 representation of that district within the brigade.

6 And then also if the number of nominations being submitted
7 by an underrepresented district are low, then we can kind of
8 focus our efforts on application guidance counseling, any trips
9 or school visits, any outreach efforts. We kind of focus them
10 towards underrepresented districts as well.

11 Q. And why is it important to the Naval Academy to focus your
12 efforts on underrepresented districts?

13 A. We want to try to represent as many districts as we can
14 within the brigade of midshipmen. So for those
15 underrepresented districts, essentially, if we don't do
16 anything, then they won't get better on their own, kind of.

17 So we do focus our efforts more on underrepresented
18 districts so that we can try to, I guess, like I said earlier,
19 just get them off of our underrepresented districts list.

20 Q. What do the racial demographics of underrepresented
21 districts tend to be?

22 A. Minority populations.

23 Q. Our next document is going to be Defendants' Exhibit 145.
24 Again, we're not going to show this on the screen --

25 THE COURT: Ms. Yang, I don't mind missing a few, but

1 it's of great help to me to have these on the screen. So if we
2 remember tomorrow, I can't possibly lift up these notebooks and
3 go at this pace back and forth looking at the documents.
4 That's why we have the television screens.

5 **MS. YANG:** Certainly, Your Honor. And tell you what.
6 This document actually has redactions on it; so we can put it
7 up on the screen.

8 **THE COURT:** Okay. That's fine. Just for purposes for
9 tomorrow, really, I don't mind a few. But once you get three,
10 four, five, six documents I don't see on the screen, it's not
11 helpful to me. And I can't stop, lift up the book, page
12 through and then keep -- I can't keep up with you, quite
13 frankly, which is very rare for me, as quickly as I go
14 sometimes.

15 But I'm just saying that, for tomorrow's purposes, try to
16 have as few documents not on the screen as you can. This is
17 very helpful to me. That's why we have all these TV screens
18 here.

19 **MS. YANG:** Understood. Thank you, Your Honor.

20 All right. So now we have up on the screen Defendants'
21 Exhibit 145. Again, this has not been objected to.

22 **BY MS. YANG:**

23 **Q.** And you have a copy in your book as well, Ms. Hwang.

24 **A.** Yes.

25 **Q.** So, obviously, PII has been redacted from this document,

1 but can you tell what this document is?

2 A. Yes.

3 Q. What is it?

4 A. This is the view of the application for the admissions
5 board members when they are briefing a record.

6 Q. Is this also the application that the slate review
7 committee sees?

8 A. Yes.

9 Q. On page 1 of this document, do you see where it says
10 "Race"?

11 A. Yes.

12 Q. Who provides the information that populates that field?

13 A. The candidate.

14 Q. What are the options the candidate can choose from when
15 answering this field on race?

16 A. American Indian or Alaskan native, Black or African
17 American, Asian, White, Pacific Islander or Native Hawaiian, or
18 decline to respond.

19 Q. Is the candidate limited in how many options they can
20 select?

21 A. No.

22 Q. And for the Court's purpose, could you please point out
23 the key portions of this document, perhaps by reference to a
24 page number or a section of the document, that the slate review
25 committee looks at when making decisions on candidates.

1 A. So the slate review committee will definitely review this
2 whole entire application. But a lot of times where we do focus
3 when we're doing our second look or review are kind of the
4 bigger blocks that are redacted, so the comments. And that can
5 be the recommendation portions either by their school
6 officials, the blue and gold officers.

7 So we just want to make sure that we are reading through
8 all the words to make sure that the admissions board did not
9 miss and that we are not missing any words that are in the
10 bodies of these recommendations that may be alarming or
11 negative to the candidate.

12 Q. Just so the Court has a clean record later when he's
13 looking back on the transcript, would you mind identifying the
14 page numbers for the places where the slate review committee
15 looks at that narrative?

16 A. Sure. So on 004 the student's personal statement, we
17 definitely read through that to make sure that there's nothing
18 alarming in their essay.

19 On 11 -- 011, there's -- comments box is from the
20 counselor of that school.

21 On 012, the English teacher also has a comments box that
22 they can put. On this particular one, the comments were not
23 very long, but we would still read through all of the words.

24 On 013, the math teacher also has a place for them to
25 write comments, and so we would be reading through those words.

1 And then on 016, the blue and gold officer interview has
2 many blocks that they can do -- submit their write-up. And it
3 bleeds into 017 as well.

4 Q. Thank you. Let's go back to Defense Exhibit 91, please.

5 **THE COURT:** I think this might be an appropriate point
6 to stop. It's about 5:00 now. We're stopping for the day.
7 We'll start again promptly at 10:00 tomorrow.

8 Ms. Hwang, you shouldn't discuss your testimony with
9 anyone while you're still on the witness stand. Be careful
10 with that.

11 Anything further from the point of view of the plaintiff
12 at this point before we adjourn for the day?

13 **MR. MORTARA:** No, Your Honor.

14 **THE COURT:** All right.

15 Anything further from the defense before we adjourn for
16 the day?

17 **MR. GARDNER:** Nothing from the government.

18 **THE COURT:** Thank you all very much. It's been a very
19 productive day.

20 And with that, this Court stands adjourned for the day.
21 And we'll reconvene tomorrow at 10:00. Thank you all very
22 much.

23 **THE CLERK:** All rise. This Honorable Court stands
24 adjourned for the day.

25 (Court adjourned at 4:59 p.m.)

1 CERTIFICATE OF OFFICIAL REPORTER
2
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4

5 I, Ronda J. Thomas, Registered Merit Reporter, Certified
6 Realtime Reporter, in and for the United States District Court
7 for the District of Maryland, do hereby certify, pursuant to 28
8 U.S.C. § 753, that the foregoing is a true and correct
9 transcript of the stenographically-reported proceedings held in
10 the above-entitled matter and the transcript page format is in
11 conformance with the regulations of the Judicial Conference of
12 the United States.

13
14
15 Dated this 16th day of September 2024.
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Ronda J. Thomas
Ronda J. Thomas, RMR, CRR
Federal Official Reporter

BY MR. CONNOLLY: [17] 126/11 127/1
129/1 129/25 132/23 146/11 146/15

BY MR. ROBINSON: [2] 159/11 161/21

BY MS. YANG: [2] 224/22 234/22

MR. CONNOLLY: [19] 89/3 89/11 111/22
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MR. ROBINSON: [35] 112/2 113/3 113/5
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MR. STRAWBRIDGE: [2] 19/9 19/12

MR. HASSON: [1] 4/21

MS. YANG: [10] 191/14 191/18 213/23
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THE COURT REPORTER: [1] 88/7

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